***United States Court of Appeals***

***for the***

***District of Columbia Circuit***


# TRANSCRIPT OF RECORD

# BRIEF FOR APPELLANT

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,256

JAMES H. HARRIS,

Appellant,

v.

UNITED STATES,

Appellee.

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APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF COLUMBIA



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## QUESTION PRESENTED

1. May property which was seized from appellant's automobile during a general administrative search at a time subsequent to appellants arrest, after his automobile had been impounded by the police, and towed to a police precinct lot some four or five miles from the place of arrest, and while the appellant was in custody and under arrest at the police station be received in evidence against the appellant consistent with the Fourth Amendment, where the search of the automobile and seizure of the property was performed without a warrant?

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,256

JAMES H. HARRIS,

Appellant,

v.

UNITED STATES,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

# BRIEF FOR APPELLANT

## JURISDICTIONAL STATEMENT

The District Court's jurisdiction over this case is founded upon the commission of an offense within the District of Columbia. See Title 11, D.C. Code §521(a)(2); Indictment. This Court's jurisdiction to review the final judgment entered rests upon 28 U.S.C. §1291.

## STATEMENT OF FACTS

This case involves a conviction for the offense of robbery in a one count indictment charging a violation of Title 22, Section 2901 of the D.C. Code.

Subsequent to the conviction for the offense of robbery, the District Court (Judge Robinson) sentenced the appellant to a prison term of two to seven years.

During the late evening of August 29, 1964, at approximately 11:45 P.M., a yoke robbery occurred in the 5500 block of 13th Street, N.W., Washington, D.C. (TR. 268-273)[1] Among other articles taken from the victim was a registration card belonging to the victims automobile, bearing the latters name, address and automobile tag number. (TR. 278-279)

At about the same time the robbery occurred an off duty Police Officer, (Gerry Morda), was returning to his residence near the scene of the robbery. He observed three colored males in the area get into a "1953 two tone Pord with a District Tag 2X751". The Officer ran down

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[1] "TR" - refers to the trial transcript

the street, observed the victim of the robbery, and went into a neighboring house on the street and wrote down the tag number of the automobile he had just observed leave the area where a robbery had just taken place. (TR. 324-327)

On the morning of August 30, 1964, Officer Francis Baker, Jr., of the 6th Precinct received a report on the robbery which took place in the late evening of August 29, 1964. During Officer Baker's investigation he ascertained a description of an automobile and tag number which turned out to be a car owned by the appellant in this case.

Officer Baker and his partner proceeded to the address where appellant was living, however not seeing the automobile there, they cruised around the neighborhood and spotted the car bearing the tag number which Officer Morda had supplied them. The automobile was parked in the 2500 block of M Streets, N.W., Washington, D.C. (TR.389-393)

A few minutes after the Officers spotted the automobile, the appellant approached his vehicle, whereupon he was placed under arrest by Officer Baker for the offense of robbery. (TR.393)

At this time, the appellant was searched by the arresting officers, the automobile was searched, and the appellant was advised that his automobile was being impounded for use as "evidence in the case". (TR. 34) The time of the arrest (without a warrant) was estimated to be 1:30 p.m. The appellant was transported to the 6th Precinct by police cruiser and his automobile was towed, via a police crane, to the same precinct, arriving there at approximately 3:00 p.m., an hour and a half after the appellants arrest. (TR. 36-37)

Upon arrival at No. 6 precinct, the car was placed on the parking lot immediately to the rear of the station. The arresting Officer, (Francis Baker), then proceeded to inventory the automobile as he stated, "we are required by law to search the vehicle and remove all valuables from the vehicle when it is impounded." (TR. 39) The Officer was obviously referring to a police regulation and not a law. During this so called inventory, which in fact was a thorough search of the vehicle, the Officer discovered a piece of evidence, to wit, a registration card belonging to the victim of a robbery which occurred the previous evening. This registration card was found

in the right front door well after Officer Baker had opened the door to close the window. (TR. 170,178-180)

Prior to commencement of the trial a motion was made before Judge Robinson, the trial judge to suppress the registration card. After a lengthy hearing, the Motion was denied on the apparent grounds that at the time the Officer opened the door, his "intent" was not to discover any evidence, but merely to close the windows to prevent the elements from damaging the vehicle. Therefore, the Court ruled that since the Officer could observe the piece of evidence he was not required to turn his head. (TR. 258-260) The second ground was that the Officer was obeying the police regulation directed to the securing of vehicles impounded by the Police Department. (TR. 261-262) The motion was renewed again during the trial and denied. (TR. 413-414)

The trial commenced on Tuesday, January 19, 1965, and the evidence to which appellant objected was admitted into evidence. The trial concluded on Thursday, January 28, 1965, when the jury returned a verdict of guilty as to the appellant.

## CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

1. The Fourth Amendment to the Constitution:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath and Affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

2. Title 22, Section 2901 states:

> Whoever by force or violence, whether against resistance or by sudden or stealthy seizure or snatching, or by putting in fear, shall take from the person or immediate actual possession of another anything of value, is guilty of robbery, and any person convicted thereof shall suffer imprisonment for not less than six months nor more than fifteen years.

## STATEMENT OF POINTS

1. The District Court erred in not granting appellant's Motion to Suppress in its entirety, and in thereafter admitting in evidence the item which appellant had sought in his Motion. (TR. 262)

## SUMMARY OF ARGUMENT

I. 1. The Fourth Amendment of the Constitution has over the years evolved the procedures by which law enforcement officers shall be bound in conducting searches and seizures as contemplated by the Amendment.

Basically, before a search and subsequent seizure, it is obligatory upon the official who desires to search, to first appear before a Magistrate, with a Sworn Affidavit, to support his belief that he has probable cause to believe that a crime is or has been committed, and that the place or thing to be searched contains the contraband or evidence for which the warrant was obtained.

Unreasonable, general and exploratory searches are invalid under the Fourth Amendment, and any evidence procured as a result thereof is not admissable as evidence in a Federal Criminal prosecution.

However, searches conducted incidental and contemporaneous to one's lawful arrest, or a search which is conducted because the exigencies of the circumstances require it, are not deemed unlawful or unreasonable as interpreted under the Fourth Amendment.

The Supreme Court in Preston v. United States, 376 U.S. 364 (1964), held that the search of an automobile after the arrest of its occupants, and at a time when the vehicle was under police control, and not contemporaneous to a lawful arrest failed to meet the test of reasonableness under the Fourth Amendment.

When the facts of this case are viewed in light of the holding in Preston, the District Courts ruling on appellants motion was obvious and therefor this case must be reversed and remanded for a new trial.

2. The theory upon which the District Court disallowed appellants motion is clearly not the law, since the "intent" of an officer could never be ascertained when a search was being conducted, nor can an administrative search pursuant to a police regulation supercede the requirements of the Fourth Amendment.

Secondly, the "Open View" doctrine does not apply to the facts of this case since the searching Officer was the moving element in changing the position of the doors to permit an "open view" of the evidence. Since the officer in this case did not know what he was searching for at the time he discovered it, the Fourth Amendment was immediately being violated. Particularity is the rule, not the exception. General and warrantless searches of an automobile at a time subsequent to arrest, where there is no exigent circumstances to dispense with the securing of a warrant are unlawful.

The governments argument advanced at the motion to suppress, attempting to justify the search of the automobile and seizure of its contents was that the automobile was legally seized incident to appellants lawful arrest. Since the automobile was an instrumentality of the crime, the car and its contents could be searched without the need for a search warrant.

Finding no precedent or case supporting this argument, it is assumed that the government seeks a reversal of Preston and preceding cases governing searches of automobiles without a warrant.

## ARGUMENT

### I. THE ADMISSION INTO EVIDENCE OF AUTOMOBILE REGISTRATION CARD AGAINST THE APPELLANT AT HIS TRIAL WAS THE PRODUCT OF AN UNLAWFUL SEARCH AND SEIZURE AND IT WAS ERROR TO ADMIT IT INTO EVIDENCE AGAINST HIM.

1. The Fourth Amendment denounces only searches which are deemed "Unreasonable", as applied to the facts and circumstances of the particular situation. The necessity for securing a warrant has been aptly stated by the Supreme Court in Johnson v. United States, 333 U.S. 10, 13, (1948):

> "The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competetive enterprise of ferreting out crime. Any assumption that evidence sufficient to support a magistrate's disinterested determination to issue a search warrant will justify the officers in making a search without a warrant would reduce the amendment to a mullity and leave the people's homes secure only in the discretion of police officers..."

To dispense with the procedures for obtaining a warrant in order to conduct a search would be diametrically opposed to the protections afforded by the Fourth Amendment.

This Court in Smith v. United States, 118 U.S. Appeals D.C. 235 (1964), a case dealing with the search of an automobile, set forth those instances where a warrantless search of an automobile did not violate the "reasonableness" test, the Court said;

> "Even where probable cause exists a warrantless search is forbidden unless made incident to a valid arrest or justified by exceptional circumstances, such as a significant possibility of removal or destruction of the object of the search." [1] (118 U.S. Appeals D.C. at page 238)

Prior to this Courts decision in Smith, the very question of a warrantless search of an automobile which is the subject of this appeal was decided in Preston v. United States, 376 U.S. 364 (1964). In Preston, three defendants were arrested sitting in an automobile at 3:00 a.m. in the morning. At the time of defendants arrest, they were searched for weapons, and then transported to the police station. Subsequently, their automobile was towed to a police garage, where the police officers conducted

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[1] Cases Cited:
Jones v. United States, 357 U.S. 493 (1958);
Johnson v. United States, 333 U.S. 10, 14-15 (1948);
Agnello v. United States, 269 U.S. 20 (1925);
Carroll v. United States, 267 U.S. 132 (1925);
Brinegar v. United States, 338 U.S. 160 (1949);
Ker v. California, 374 U.S. 23, 41-42 (1963).

a search of the automobile. Certain items were seized as a result of the search and admitted into evidence at the defendants trial for conspiracy to rob a federally insured bank. The Court ruled that the evidence obtained without a warrant was inadmissable because; (a) the search was not incident to the arrest and (b) it failed to meet the reasonableness test under the Fourth Amendment. An interpretation and application of the law as decided in Preston when applied to the facts of the present appeal, necessitates a reversal of the judgment in the District Court.

There can be no justification for the search of appellants automobile on either of the two exceptions, that of a contemporaneous search incident to a lawful arrest, nor a search based on the exigency of the circumstances.

Considering the exceptions separately I quote from Preston:

> "The rule allowing contemporaneous searches is justified, for example, by the need to seize weapons and other things which might be used to assault an officer or effect an escape, as well as the need to prevent the destruction of evidence of the crime - things which might

> easily happen where the weapon or evidence is on the accused's person or under his immediate control. But these justifications are absent where a search is remote in time or place from the arrest. Once an accused is under arrest and custody, then a search made at another place, without a warrant, is simply not incident to the arrest." (376 U.S. at 367)

Applying the facts of this case, the testimony at the pre-trial hearing was that appellant was arrested at 1:30 p.m. At the time and place of arrest the appellant and his automboile were searched. The appellant was then taken to the police station, interrogated, and booked for the crime of robbery. The automobile which was in the police custody was being towed via a police crane to the police station where it arrived at 3 p.m., an hour and a half after appellants arrest. It was at this time that a second search was made and the evidence objected to at the trial was discovered and seized. It is quite obvious that this search an hour and a half later, and four or five miles from the place of arrest does not come within the first exception, that being a search incident to appellants arrest.

The second exception justifying a search without a warrant is likewise not applicable to the facts presently

before this Court. Again, quoting from Preston:

> "The search of the car was not undertaken until petitioner and his companions had been arrested and taken in custody to the police station and the car had been towed to the garage...[S]ince the men were under arrest at the police station and the car was in police custody at a garage, there was [no] danger that the car would be moved out of the locality of the jurisdiction." (376 U.S. at 368)

As in Preston, the automobile here was impounded by the arresting officer, arrangements were made to have the automobile towed to the police station and placed under police custody on the impounding area beside the precinct. This was in fact done, and at the time of the search the automobile was in police custody and under the control of the arresting officer. It follows logically that any search based on this exception is clearly erroneous. Since the appellant did not have access to the automobile or its contents at the time the evidence was discovered there was no chance that any contents of the car would disappear.

2. The District Court denied appellants motion on two grounds, first, that the searching officer did not specifically search the automobile with the "intent"

to discover and seize the evidence which appellant objected to. Secondly, the trial judge found that the "open view" doctrine was applicable, and since the officer saw what he seized, he was not required to turn his head nor secure a search warrant. Considering each of these grounds separately, there was no logical or legal basis for either.

Nowhere has appellant found any support to the argument that the "intent" of the searching official controlled whether a violation of the Fourth Amendment did in fact occur. Appellant must accept the officers testimony that he was acting pursuant to a police regulation[1] when the evidence was discovered. Now, the question arises as to whether this police regulation eliminates the necessity of securing a warrant before a search and seizure of evidence found in a vehicle, when the vehicle is under

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[1]Section 12 of General Order No. 10. Metropolitan Police Regulations. "When a vehicle is brought to a station, whether impounded, stolen, abandoned, or taken from a prisioner, it shall be the responsibility of the Officer who takes the vehicle in charge to thoroughly search such vehicle, including the glove compartment and trunk, and remove all property therefrom."

police control and the search was not made incident to an arrest. In Stoner v. California, 376 U.S. 483, (1964), a case where the police officers were admitted to the hotel room of the defendant by the room clerk and conducted a search and seized evidence without a warrant the Court stated;

> "Our decisions make clear that the rights protected by the Fourth Amendment are not to be eroded by strained applications of the law of agency or by unrealistic doctrines of "Apparent Authority". (376 U.S. at 488)

It would likewise in this instance be unrealistic to allow a police officer, who in affect was appellants agent, acting pursuant to a police regulation to search an automobile and seize evidence without a warrant, where the protections afforded by the Fourth Amendment would be violated. If this be the case, any evidence which might be seized from an automobile during an inventory search of a vehicle after it was impounded by the police would be admissable in a criminal proceeding, since at the time the officer discovered the incriminating evidence he only "intended" to discover and remove those articles of value which belonged to the defendant. This appellant submits is not the law nor should it be.

The alternative ground for denying appellants motion was the "open view" doctrine. However, as appellant reads the cases where evidence is admissable under the theory of what has been termed the "open view" doctrine, the officers were always able to see or view the contraband or other evidence through some act of the defendant, such as the defendant leaving a door to a vehicle open and an officer shining his flashlight into the car was able to see illegal whiskey. Smith v. United States, 2 Fed 2d 715 (1924); The defendant opening the door as police officers approached allowing the officers to see illegal whiskey in the back seat. Ferrell v. Commonwealth, 264 S.W. 1078 (1924); The viewing of gasoline ration stamps through an open window in a vehicle. United States v. Strickland, 62 Fed Supp 468 (1945). In each of these instances the defendants acts were always the moving factor in allowing the officers to view what they seized. The facts of this case are clear that the searching Officer (Francis Baker) himself opened the right front door to the vehicle. It was only by his own conduct that he was able to view the evidence. It therefore follows that the "open view" doctrine under these circumstances is not applicable.

The Supreme Court has repeatedly ruled that the mere fact that an officer sees evidence does not eliminate the need for securing a warrant. Taylor v. United States, 286 U.S. 1 (1932); McDonald v. United States, 335 U.S. 451 (1948); Johnson v. United States, 333 U.S. 10 (1948); Chapman v. United States, 365 U.S. 610 (1961); Stoner v. California, 376 U.S. 483 (1964)

There is no dispute in this case that the car at the time the evidence was discovered was in the complete and dominant control of the police. There is no reason given or were there any exceptional circumstances existing at the time, which justified the search and seizure of the registration card. The Court in McDonald cited supra, very appropriately stated:

> "No reason, except inconvenience of the officers and delay in preparing papers and getting before a magistrate, appears for the failure to seek a search warrant. But those reasons are no justification for by-passing the constitutional requirement." (335 U.S. at page 455)

3. The governments argument on the Motion to suppress was that since the automobile was seized as an instrumentality of the crime of robbery, the need to comply with the Fourth Amendments requirement of obtaining

a search warrant could be dispensed with.

Appellant can find no authority to support the argument that the automobile was an instrumentality of the crime in this case, nor does the governments novel theory circumvent the Fourth Amendment, even if the seizure of the automobile was an instrumentality of the crime, a point which is not conceded.

Assuming arguendo, that the automobile was an instrumentality of the crime of yoke robbery as were the facts in this instance. The subsequent search of the automobile at the precinct, when there was no need to dispense with obtaining a warrant, if upheld would give the police "carte blanche" in searching for fruits or instrumentalities of a crime in any instance where the police could justify the "instrumentality of a crime" theory. For instance, if one is arrested for operating a lottery in a house, under the governments theory the house could be searched at any time, subsequent to arrest, without a warrant, since the house would be an instrumentality of operating a lottery. Likewise a search of an automobile under this theory would successfully withstand the Fourth Amendment.

The Fourth Amendment requirement of particularity could be eliminated and a search and seizure "in toto" of any and all contents of the place or thing searched would be legal. The Supreme Court in Kremen v. United States, 353 U.S. 346 (1957), decided and settled this very issue of a wholesale seizure of all the contents of a premises without being specific as to what was to be seized.

In the case before the Court, the undisputed testimony of the police officer who conducted the inventory search, was that his sole purpose in searching the vehicle was to remove any valuables belonging to the appellant and to close the windows of the vehicle to protect it from the elements. The officer had no idea that he was going to find a "fruit of the crime" which had been committed the previous day. However, it should be pointed out that when he arrested the appellant he advised him he was seizing the car as evidence. Further, the officer conducted a further search of the vehicle at the precinct, without a warrant, after discovering the registration card to ascertain whether there were other fruits of the robbery in the vehicle.

It can be surmised from the substance of the officers testimony that there was a suspicion that some evidence would be turned up by a search of the vehicle. Again, this very point was decided in Agnello vs. United States, 269 U.S. 20 (1925), where the Court said:

> "Belief, however well founded, that an article sought is concealed in a dwelling house furnishes no justification for a search of that place without a warrant. And such searches are held unlawful notwithstanding facts unquestionably showing probable cause."

Applying the governments theory of the seizure of the automobile, and conceding that there was probable cause for its seizure, the law as quoted from Agnello would require the government to obtain a warrant.

Appellants position is that no matter what theory the government advanced could it justify a search of the automobile in this instance at the precinct, after the arrest, where there was no reason to dispense with obtaining a warrant. Preston answers the question raised in this appeal and regardless of how the facts are viewed they fit squarely between the teeth of that decision.

## CONCLUSION

For the reasons stated, the judgment of the District Court should be reversed.

Respectfully submitted,

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BRIEF FOR APPELLEE

# United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

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No. 19,256

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JAMES H. HARRIS, APPELLANT

*v.*

UNITED STATES OF AMERICA, APPELLEE

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**Appeal From the United States District Court For the District of Columbia**

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Crim. No. 894-64

## QUESTION PRESENTED

In the opinion of the appellee, the following question is presented:

Was appellant's car properly seized as an instrumentality of crime incident to his arrest and, as such, lawfully entered at the precinct in order both to close its windows to protect it from the rain that was falling and to safeguard its contents from possible loss, so that evidence revealed in the act of seeking to close one window was admissible, when that very car was spotted by the police the night before, successfully transporting appellant away from the robbery he had just committed?

# INDEX



## TABLE OF CASES

* Cases chiefly relied upon are marked by asterisks.

# United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

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No. 19,256

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JAMES H. HARRIS, APPELLANT

*v.*

UNITED STATES OF AMERICA, APPELLEE

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**Appeal From the United States District Court For the District of Columbia**

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## BRIEF FOR APPELLEE

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## COUNTERSTATEMENT OF THE CASE

Appellant was indicted, tried by jury, convicted, and sentenced to imprisonment for a period of two to seven years on one count of robbery in violation of 22 D.C.C. § 2901.

At approximately 11:45 p.m. on Saturday evening, August 29, 1964, appellant, together with two other men,[1] beat and robbed Paul Herring of 5516 Thirteenth Street, Northwest, in the District, as Mr. Herring was walking

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[1] Another man alleged to have been one of the robbers, Jerry Hines, was acquitted by the same jury that convicted appellant.

towards the front steps of his house (Tr. 268-274). Appellant initiated the robbery by asking Mr. Herring for a light and then charging him from the front, while appellant's cohorts attacked from the rear and side (Tr. 269, 271-272). They threw Mr. Herring down on the grass in a tree box, choked and pounded him, and removed his $49.95 Bulova watch from his left wrist and his wallet containing at least $150 and the registration card for his car from his right trousers pocket, before running away north on Thirteenth Street (Tr. 272-273). Not only did the complainant get a good look at appellant that night, Officer Casmir Morda of the Sixth Precinct did likewise. Officer Morda had just alighted from an auto shortly before midnight on the northeast corner of Thirteenth Street, Northwest, in the 5600 block, when he saw Harris and two other Negro males run north on the opposite side of Thirteenth Street and get into a 1953 two-tone green Ford with District license tag number 2X 751, parked at the intersection by which he was standing (Tr. 324-327, 330-332, 338, 386). Officer Morda got an extra look at Harris because Harris was driving the car and backed it up very close to the officer (Tr. 384). As the car was driving off, Officer Morda heard a cry down the block and ran to aid Mr. Herring, who was seated in a nearby tree box, bleeding around the face (Tr. 274, 327, 333-334). As soon as the officer determined what had occurred, he telephoned his precinct and described the getaway car (Tr. 327, 334).

The complainant was able to identify not only his assailant but also his car registration card, which had been located in appellant's car under circumstances which were the subject of appellant's motion to suppress and of a lengthy hearing held on that motion (Tr. 4-262, 278-279).

The trial court made findings of fact in reciting its version of the events of August 30, 1964, which led up to the discovery of the registration card, findings which are not challenged by appellant and are fully in accord with the testimony at the hearing (Tr. 134-136, 138-142, 193-194, 253-255). When Officer Francis Baker, Jr. re-

ported to duty at the Sixth Precinct on Sunday morning, August 30, he was given Officer Morda's description of the automobile involved in the robbery committed the night before and assigned to locate the car and its owner (Tr. 32-37). He and his partner, Detective Robert Drescher, traced the car to appellant at his home in the 2500 block of M Street, Northwest, where at approximately 1:30 p.m., they located the car, bearing the precise tag number indicated by Officer Morda. Officer Baker arrested appellant after he saw appellant enter the parked car on the driver's side (Tr. 32, 44, 65). Appellant was ordered out and searched (Tr. 45). Officer Baker looked into the car and saw only an open car of beer (Tr. 61). He may also have reached under the front seat for weapons, but made no thorough investigation of the interior and did not enter either the glove compartment or the trunk (Tr. 62, 77). Nor did he open the front door on the passenger's side at that time (Tr. 63).

Officer Baker decided that the car should be picked up and impounded for use as evidence in the case, since it was the very car described in the robbery lookout (Tr. 34, 68). Accordingly, he called for a police crane to remove the car to the precinct while he and his partner took appellant there in the cruiser (Tr. 34, 36). When they left the scene of the arrest, the car was legally parked in front of 2517 M Street, unlocked, with the windows down (Tr. 46-47, 49, 67).

At approximately 3 p.m. the crane operator came into the precinct and informed Officer Baker that he had put the car in the precinct lot, an area abutting the station house itself, enclosed by fence on two sides and a hedge on the third, but easily accessible to the public (Tr. 37-38, 69-70, 87, 163). The operator told Officer Baker that it was raining out, but that he hadn't closed the windows, so Baker proceeded outside to lock the car and take care of protecting it against the rain as well as to put a property tag on it, identifying it in accordance with police practice dictated by General Order No. 10, Series 1958, Sections 11 and 12 (Tr. 38-39, 71-72, 163). The officer

also wanted to use appellant's keys and remove all valuables wherever they might be found in the car, inscribing them on the property book per police regulations (Tr. 164).

After he had tied the tag to the steering wheel, he looked through the interior of the car, the rear seat and floor, leaned across the steering wheel and opened the glove compartment, but found no objects that were of value for safekeeping (Tr. 165). He did not remove either seat or go into the trunk (Tr. 165-166). He did open the right-hand rear door so as to be able to roll up the attached window and secure the door (Tr. 74, 186). It was when he opened the right-hand front door in order to close its window and lock it that he discovered the registration card in question (Tr. 166-167, 187). It was lying there, staring him in the face on the weather-stripping or jamb which the door, when closed, would hide from view (Tr. 40, 167).

On the basis of this evidence the trial court concluded that the discovery of the registration card did not violate the Fourth Amendment and denied the motion to suppress (Tr. 262). The ruling was made on two independent grounds. First, that, since the officer legally opened the door for the sole purpose of operating the window mechanism, any object that came into his view as a result of such legal activity was not suppressible (Tr. 255-260). Second, that the applicable section of the police order rendered Officer Baker's conduct with respect to the properly impounded car reasonable in light of the weather, the accessibility of the lot, and the need to preserve personal property (Tr. 260-262).

## CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable

searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

## SUMMARY OF ARGUMENT

Incident to appellant's concededly lawful arrest his car, which had enabled him to make his getaway the previous night from the scene of the robbery he had just committed and whose license tag had been noted by a policeman who happened upon the scene, was lawfully seized as an instrumentality of the crime for which he was arrested. Once the car was properly in the possession of the police, it was freely subject to further examination without any constitutional limitation based upon the gap between the time and place of arrest and the time and place of that examination. Thus, it was reasonable for the police to enter the car at the precinct some one and a half hours after appellant's arrest in order both to crank up the car windows to keep out the rain and to safeguard any property therein from depradation while the car remained on the precinct lot. The evidence that came into view when an officer opened a door to get at the car's window mechanism was, therefore, admissible.

## ARGUMENT

**The discovery of the registration card was not the product of an illegal search or seizure.**

(Tr. 31-262)

Appellant was lawfully arrested for robbery at 1:30 p.m. on the 30th of August, 1964, in the 2500 block of M Street, Northwest, while he was sitting behind the driving wheel of his 1953 two-tone green, four-door Ford bearing District license tag number 2X751. On that there is no dispute. Nor is there any doubt that some one and a

half hours later, in the parking lot of the Sixth Precinct, Officer Francis Baker, while in the process of opening the right-hand front door of that car to gain access to the knob by means of which he could crank the window up to protect the interior from the rain that was then falling, came face to face with an auto registration card belonging to the robbed party, which was lying on the surface of the car frame, underneath that door. The sole contested issue in this case is whether the Fourth Amendment to the Constitution was violated when Officer Baker bent over and picked up that card to examine it and preserve it for use at trial. Was that event in and of itself of such constitutional dimensions as to amount to a search and seizure conducted at a time and in a place remote from the arrest of appellant? See generally, *Preston* v. *United States*, 376 U.S. 364, 368 (1964); *Bowling* v. *United States*, No. 18,693, decided June 24, 1965.

The only reasonable answer in light of the circumstances that preceded the moment when Officer Baker's fingers touched the card (as those circumstances were found by the trial court, Tr. 134-136, 138-142, 193-194, 253-255) is "no." The seizure or appropriation of the property by exercising dominion and control over[2] it occurred at 1:30 p.m. when, immediately after arresting appellant, Officer Baker asserted his power over appellant's car, which contained the card, by ordering it impounded as an instrumentality of the crime of robbery (Tr. 34, 68, 193-194). When the officer called for the police crane to remove the car to the precinct lot for possible future use in the case against appellant, the seizure in the constitutional sense was complete, and no further Fourth Amendment questions could arise with respect to the car so long as that original instrumentality seizure was valid.

The propriety of incidentally seizing an object which has been used to facilitate the successful conduct of a

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[2] See *Weeks* v. *United States*, 232 U.S. 383, 397 (1914); *Hale* v. *Henkel*, 201 U.S. 43, 76 (1906).

criminal enterprise and significantly further its ends[3] has long been established with respect to such items as account ledgers and bills,[4] cancelled checks,[5] forged birth certificates, bank books and vaccination certificates,[6] and shoes.[7] Any distinction between such objects and automobiles in terms of the relative size of the thing seized may affect police convenience in storing the item, but is otherwise a purely superficial difference of no constitutional import whatever. Indeed, Congress has specifically provided for transforming these temporary seizures of instrumentalities for the duration of criminal litigation into permanent confiscation in the case not merely of contraband, but also of vehicles and conveyances employed to transport contraband. See *e.g.*, 18 U.S.C. §§ 3615, 3618 (liquor carriers); 26 USC § 7302 (carriers used to violate internal revenue laws), 49 USC §§ 781-782 (contraband carriers, including those with cargos of narcotic drugs, firearms, forged coins or securities, forgery machinery).

To the extent that it enabled appellant to make a quick getaway from the robbery scene, this 1953 Ford, like the rubber-heeled shoes in *Guido* or weapons effecting escape, was an instrumentality of the crime, essential to the successful asportation of the fruits of the robbery, an integral part of the scheme.[8] The police acted reasonably and

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[3] From this point of view the car is an inanimate aider and abettor of the person charged with the crime. Compare the standard definition of aiding and abetting set forth in *United States* v. *Peoni*, 100 F.2d 401, 402 (2d Cir. 1938) (L. Hand, J.)

[4] *Marron* v. *United States*, 275 U.S. 192 (1927) (objects utilized in carrying on the illegal business of selling liquor).

[5] *Harris* v. *United States*, 331 U.S. 145 (1947).

[6] *Abel* v. *United States*, 362 U.S. 217, 223-225 (1960) (aids in the undetected commission of espionage).

[7] *United States* v. *Guido*, 251 F.2d 1, 3-4 (7th Cir.), *cert. denied*, 356 U.S. 950 (1958) (shoes facilitated getaway).

[8] The felony-murder scope of a robbery encompasses flight with the fruits. See *Coleman* v. *United States*, 111 U.S. App. D.C. 210, 295 F.2d 555 (1961), *cert. denied*, 369 U.S. 813 (1962).

prudently when they seized it, indeed, might have been imprudent had they not done so. See *Chappell* v. *United States*, —— U.S. App. D.C. ——, 342 F.2d 935, —— (1965).

Once the car had been lawfully seized, the limits of the requirements of the Fourth Amendment were simultaneously reached and no further constitutional compliance problems remained vis-a-vis the vehicle. The police could handle the car in any way they saw fit, subject not to any motion to suppress, but only to the possibility of liability for damages occasioned by their actions.[9] With the property properly in police custody, it could be examined at will without any need to obtain a warrant or act promptly. The temporary right to control the property belonged to the police and their unfettered exercise of that right could in no way constitute a trespass or invasion of appellant's interest in the car, since, in the constitutional context, he had no interest to assert against the police at that stage.

It is this principle that once a person is lawfully taken into custody or his property is lawfully seized by the police he and/or it is freely subject to further examination of a non-conscience shocking nature,[10] even if that examination is intended to and does yield evidence usable against that person at trial, that sustains the practice of photographing and finger-printing suspects,[11] of examining a defendant's body,[12] of putting certain clothes on a

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[9] Tort liability might conceivably involve the District insofar as post-seizure handling is non-discretionary in the sense that imposition of liability would not curtail the free exercise of police judgment in matters of delicacy or difficulty. See generally, *Elgin* v. *District of Columbia*, —— U.S. App. D.C. ——, 337 F.2d 152 (1964).

[10] See *Rochin* v. *California*, 342 U.S. 165 (1952).

[11] See *Smith and Bowden* v. *United States*, 117 U.S. App. D.C. 1, 4, 324 F.2d 879, 882 (1963), *cert. denied*, 377 U.S. 954 (1964) (collecting cases); *United States* v. *Bynum*, 107 U.S. App. D.C. 109, 274 F.2d 767 (1960).

[12] See *McFarland* v. *United States*, 80 U.S. App. D.C. 196, 197, 150 F.2d 593, 594 (1945), *cert. denied*, 326 U.S. 788 (1946).

defendant,[13] of taking purely evidentiary matter from a defendant's person,[14] of testing a defendant's clothing for blood or hair,[15] of testing capsules containing white powder for suspected narcotics, of performing ballistic tests on guns, of opening bottles to determine the alcoholic nature of their contents, of having experts peruse documents seized in the course of a raid upon a gambling operation.

What Officer Baker did to appellant's car after he directed its impounding as an instrumentality of the crime and had it transferred to the precinct lot can scarcely be labelled "shocking." The only appropriate appellation is "reasonable" in light of the fundamental police function of protecting private property, including the property of a person accused of an offense involving that very property. See 4 D.C. Code § 119, Third, expressly entrusting the Metropolitan Police Department with that function and 4 D.C. Code §§ 151-167 establishing statutory procedures for handling property in police custody in connection with various offenses.

Certainly there could be nothing more reasonable than, at the earliest possible moment after appellant's car was delivered to the precinct parking lot, to secure that car against the immediate hazard of injury from the rain that was starting to fall and the future threat of depradation of its contents while it remained on the lot, easily accessible to any member of the public who wanted to loot it. These were the very objects Officer Baker had in view, as the trial court found (Tr. 254-255, 257-258), when he left the station house and went out to the car. The actions he took, *i.e.*, scrutinizing the interior and the glove compartment, attaching a property tag to the steering

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[13] See *Holt* v. *United States*, 218 U.S. 245, 252-253 (1910). See generally, 8 WIGMORE, EVIDENCE §§ 2263, 2265 (McNaughton rev. ed. 1961).

[14] *People* v. *Chiagles*, 237 N.Y. 193, 142 N.E. 583 (1923).

[15] *Robinson* v. *United States*, 109 U.S. App. D.C. 22, 283 F.2d 508, *cert. denied*, 364 U.S. 919 (1960).

wheel, raising the windows, and locking the doors, were entirely in keeping with these dual purposes.

Common sense and the prospect of liability for negligence resulting in property damage are sufficient authority for sustaining the reasonableness of seeking to shut the car windows. Nor would the hypothetical prudent and cautious police officer, whom this Court holds up as the model of proper police conduct, overlook tagging and locking the car, after first taking custody of any valuables that might be removed by unauthorized persons, particularly since such an officer would be aware of the applicability of Metropolitan Police Department General Order Number Ten, Series 1958, issued pursuant to the authority vested in the Chief of Police or his delegates pursuant to Reorganization Order for the District of Columbia No. 46, Title I, Administration, Appendix, D.C. Code. Section 12 of that order provides in pertinent part that

> "When a vehicle is brought to a station, whether impounded, stolen, abandoned, or taken from a prisoner, it shall be the responsibility of the officer who takes the vehicle in charge to thoroughly search such vehicle, including the glove compartment and trunk, and remove all property therefrom. He shall be responsible for seeing all such property is recorded and properly safeguarded."

The validity of this method of handling property in police custody was not questioned by the Municipal Court of Appeals for the District of Columbia in *Williams* v. *United States*, 170 A.2d 233 (1961)[16] nor would there by any valid objections to its operation in the circumstances of this case, given the vulnerable nature of the car's location and the police responsibility for its safe-

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[16] In *Williams, supra*, the court was troubled not by the impounding procedure, but by the legal basis for impounding at all, since the police acted in the absence of any traffic or parking violation to remove the automobile from its lawful parking place in front of the police station. No instrumentality seizure claim was ever asserted in that case.

keeping for the duration of their instrumentality custody of it.[17]

Given the seizure of the car as a criminal instrumentality and Officer Baker's subsequent non-shocking handling of that car to inventory its contents and protect its interior from the elements, the discovery of the registration card on the door jamb or weatherstripping cannot be deemed the product of any illegality of all, let alone unlawful conduct of constitutional force. Once the right-hand front door was opened so that the window might be raised, Officer Baker was not required to shut his eyes to what the lawful act of opening the door revealed, even if it constituted evidence of the very crime whose investigation he had interrupted to take care of the car. See, *e.g.*, *Harris*, *supra*, n.5; *United States* v. *Lee*, 274 U.S. 559 (1927); *Ellison* v. *United States*, 93 U.S. App. D.C. 1, 3, 206 F.2d 476, 478 (1953); *United States* v. *McDaniel*, 154 F.Supp. 1 (D.D.C. 1957); *Campbell* v. *United States*, 174 A.2d 87 (Mun. Ct. App. 1961).

Appellant's reliance upon *Preston*, *supra*, as dispositive of this case is misplaced. The Supreme Court in *Preston* was not faced with the seizure of the car as an instrumentality of the crime for which its occupants were arrested, the seizure occurring contemporaneous to the arrest. Rather, the Court had before it an exploratory search of a car whose occupants were arrested for vagrancy, a crime demonstrably without fruits or instrumentalities (although the Court bypassed this issue), with the search yielding evidence of a conspiracy to commit a crime in the future. The Newport, Kentucky police, unlike Officer Baker, had no valid reason for towing Preston's car to a garage, had no information definitively linking his car with a crime already committed and which formed the basis of the arrest.

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[17] The impounding procedure followed in this case would even have justified introduction in evidence of the registration card had it been found in the glove compartment or trunk, separate and apart from the matter of rain proofing the interior of the car.

Similarly, in *Smith and Anderson* v. *United States*, 118 U.S. App. D.C. 235, 335 F.2d 270 (1964) and *Bowling*, *supra*, there were no facts providing a predicate for an instrumentality seizure of the car searched at a time subsequent to and in a place different from that of the arrest. In *Smith* there was no indication that the police realized that Anderson's car was an instrumentality of an auto theft until after the search revealed that it contained the missing parts of another car, while, in *Bowling*, the only information the police had was that the holdup men had fled from the gas station on foot. In neither case did the police express any intention to take possession of the cars as criminal instrumentalities; in neither case would the circumstances known to the police have supported such a seizure.[18]

Appellant's final contention, that to validate the examination conducted at the precinct of the car which had been previously seized at the time and place of the arrest as an instrumentality of the crime which culminated in the arrest would effectively permit the police to lay instrumentality claim of a house in which some sort of illegal business was operating and, thereafter, ransack it at will, ignores not only the continued controlling and limiting impact of *Kremen* v. *United States*, 353 U.S. 346 (1957) upon the right to search a house incidental to arrest, but also the significant distinction between applying the Fourth Amendment test of reasonableness to fixed structures like houses and to motor cars, a distinction repeatedly recognized and referred to both by this Court and the Supreme Court. *E.g.*, *Preston*, *supra*, 376 U.S. at 366-367; *Carroll* v. *United States*, 267 U.S. 132, 153 (1925); *Price*, *supra*, slip opinion at pp. 3-4; *Bowling*, *supra*, slip opinion at p. 7 (McGowan, J., dissenting).

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[18] The Government has previously presented this Court with an instrumentality seizure theory in its brief in *Price* v. *United States*, No. 18,901, decided June 10, 1965. The Court's opinion in that case did not explicitly deal with this theory, for the Court relied heavily upon the visibility at the scene of the arrest of the articles later seized at the preceinct, a factor missing here, since the right-hand front door was not opened on M Street.

The somewhat unusual facts of this case, involving a crime whose successful perpetration depended upon a getaway car whose tag number was spotted and traced to appellant the following day, a purposeful instrumentality impounding, the embarking upon prescribed police impounding procedure designed to safeguard private property, the effort to seal the car from rain that was actually falling at the time, and the happenstance of opening a previously unopened car door in order to be able to crank its window closed leading to the plain view revelation of property taken from the complainant during the course of the robbery, serve to distinguish it completely from every prior incidental car search case and to render the evidence derived therefrom not the suppressible product of a violation of the Fourth Amendment, but the usable fruits of a proper instrumentality seizure.

## CONCLUSION

Wherefore, it is respectfully submitted that the judgment of the District Court should be affirmed.

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**BRIEF FOR *AMICUS CURIAE***
**APPOINTED BY THE COURT**

# United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,256

JAMES H. HARRIS,

*Appellant,*

—v.—

UNITED STATES,

*Appellee.*

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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*Order of the Court*

*Of Counsel:*
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April, 1966

## QUESTION PRESENTED

*Amicus curiae* adopts appellant's statement of the question presented.

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# United States Court of Appeals

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APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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## BRIEF FOR *AMICUS CURIAE* APPOINTED BY THE COURT

Pursuant to an order of the Court dated April 6, 1966, as amended by order dated April 15, 1966, appointing the undersigned as *amicus curiae* in this case for the purpose of filing a brief in connection with the rehearing of this appeal *en banc,* the undersigned submits this brief and urges that the judgment of the District Court be reversed.

## STATEMENT OF FACTS

The facts relevant to the search and seizure question in this case are capable of brief statement.

Shortly before midnight on August 29, 1964, Officer Morda of the Sixth Precinct saw three men running in the 5600 block of 13th Street, N.W., and getting into a

1953 Ford. Officer Morda took note of the license tag. Just as the car was driving off, the officer heard a cry down the block and came upon the victim of a "yoke" robbery. There had been taken from the victim of the robbery a watch and a wallet containing money and a registration card for his car. Officer Morda proceeded to phone the description of the car (which was appellant's) to the precinct.

The next morning, August 30, Officer Baker of the Sixth Precinct received Officer Morda's description of the automobile and was assigned to locate the car and its owner. (Tr. 134-35) Officer Baker looked for the car in the area of appellant's home, the 2500 block of M Street, N.W. At about 1:30 p.m. the car was located in that block and at that time appellant was seen to enter the car. Officer Baker approached appellant and arrested him, stopping him from entering the car and searching him. (Tr. 8-9) Only a cursory inspection of the car was made at that time. (Tr. 62; 136; 149-50)

Officer Baker called for the police crane to come and take the car off to the Sixth Precinct station. Appellant was taken in a police cruiser to that precinct station (a ten or twenty minute drive), Officer Baker leaving appellant's car behind, unattended and unlocked, to be picked up by the police crane. (Tr. 10; 49; 86)

At about 3 p.m., the police crane operator came into the precinct headquarters and informed Officer Baker that he had put the car onto the police parking lot. The crane operator told Baker that a light rain was falling but that he had not closed the windows, inasmuch as he did not want to disturb fingerprints. (Tr. 38; 163)

Officer Baker then, with appellant's keys, went out to the car for the purpose of tagging it, rolling up the windows, and making a search through it. (Tr. 164; 169) He described this search as a "search" or as "an inventory search." (Tr. 71-72; 169; 183) No warrant had been issued for this search.

Officer Baker first put a property tag on the steering wheel of the car. He then searched the rear seat and the rear floor of the car. (Tr. 165; 169) He searched in the glove compartment and found "routine things you keep in a glove compartment," (Tr. 165) which he made no effort to remove from the car and take into the precinct station. (Tr. 165) He also looked behind the sun visors. (Tr. 166)

Despite the fact that he possibly could have rolled up the right front car window while he was in the front seat searching the glove compartment and the backs of the sun visors (Tr. 188), Officer Baker proceeded out of the car and opened both doors on the right side, later testifying that his purpose was to roll up the windows. (Tr. 166-67) When he opened the right front door, the registration card which had been taken from the robbery victim was found lying on the door jamb, in the "well of the weatherstripping." (Tr. 154)

Officer Baker testified that the purpose of his "search" (Tr. 169) was to find property to protect. (Tr. 73; 164) But the officer's solicitude for the protection of the car appears to have terminated at this point, because he was "pretty excited" (Tr. 155) and he rushed into the precinct station, not recalling whether he shut the car door or left it open. (Tr. 152) He brought appellant out and confronted him with the registration card. Thereafter, Officer Baker took the card into the precinct station and put

it into the custody of the chief property clerk. (Tr. 152; 167-68)

Only thereafter was a search warrant obtained; it was directed to the property clerk and specified the registration card. (Tr. 41-43; 141)

After a motion to suppress the use of the card in evidence was made and was denied by the District Court, the card was received in evidence against appellant at his trial for robbery. Appellant was convicted and sentenced to a term of two to seven years. A co-defendant who was tried with appellant on the theory that he was one of the other men participating in the robbery was acquitted.

## CONSTITUTIONAL PROVISION AND REGULATION INVOLVED

The Fourth Amendment to the U. S. Constitution reads as follows:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Section 12, D. C. Metropolitan Police Department General Order No. 10, reads as follows:

> "When a vehicle is brought to a station, whether impounded, stolen, abandoned, or taken from a prisoner, it shall be the responsibility of the officer who takes the vehicle in charge to thoroughly search such vehicle,

including the glove compartment and trunk, and remove all property therefrom. He shall be responsible for seeing that all such property is recorded and properly safeguarded."

## STATEMENT OF POINTS

*Amicus curiae* adopts appellant's statement of points.

## SUMMARY OF ARGUMENT

The Fourth Amendment requires a warrant as a condition upon the making of searches or seizures, except in certain "jealously and carefully drawn" exceptional circumstances. In the case of *Preston* v. *United States,* 376 U.S. 364 (1964), the Supreme Court made it plain that this principle applied to searches of automobiles. The only exceptions which the Supreme Court mentioned, in *Preston,* from the rule of the necessity to obtain a warrant, were that of a search "incidental" to a valid arrest, and that of a search pursuant to the "necessity" doctrine, which has its classic application in the case of moving cars, but which, as the Court indicated, has no application at all in the case of impounded cars.

The Government here does not attempt to justify the search without warrant which resulted in the finding of the incriminating registration card on the basis of either of these two exceptions. Instead, it seeks to justify this search, alternatively, on two other theories: (1) the theory that once the appellant's car had been seized, incident to his arrest, as an "instrument" of the crime, its contents could thereafter be gone through by the police at leisure (the "instrumentality/contents" seizure theory); and (2) the theory that the police regulation providing for so-called

"inventory searches" either generally makes those searches lawful, or confirms the legality of the specific actions undertaken by the officer at the moment the card was found. Neither of these alternative theories is valid, and accordingly the search of appellant's car and the seizure of the card therefrom were unlawful.

I. 1. The "instrumentality/contents" theory would restrict the applicability of *Preston* to a very narrow category of cases; practically, to those cases where, although the car was in custody and accordingly no longer a subject of the "necessity" doctrine, that custody was unlawful. Otherwise, the legality of the police seizure of the car would, under the Government's theory, give *carte blanche* to subsequent searches of it. The clear teaching of the whole approach of the Supreme Court in the *Preston* case, however, is that the legality of the seizure of the car is irrelevant. The Court's focus was entirely on the situation prevailing when the search was actually made, and on whether either of the two exceptions it noted to the rule requiring a warrant was presented at that time. The Government's theory thus does violence to the *Preston* decision.

2. Moreover, the "instrumentality/contents" theory violates the fundamental constitutional requirement of particularity in a search or seizure. It implies that the Government can make a general, blanket seizure of everything in a car by seizing the car—including contents of which the Government has no knowledge whatsoever. As such, it violates one of the dominant principles that runs through the construction of the Fourth Amendment. Moreover, it leads to the absurd consequence of applying principles to a search without a warrant that are looser than those applied to a search with a warrant. For under a search war-

rant calling for the automobile, it would not have been lawful to have returned the registration card.

3. The Government's theoretical basis for the "instrumentality/contents" theory is based upon a false analogy between the chemical or physical analyses of small objects validly seized by the Government, and the further search of mobile places which, like cars, are generally repositories of the "papers and effects" of the people. The Supreme Court in the *Preston* case, however, recognized that cars are entitled to the protection of the Fourth Amendment, and that, in effect, a "search" of a car is just that, a "search" in the constitutional sense. This is also the common sense of the matter.

4. The lack of precedent for the "instrumentality/contents" theory, as applied to automobiles, also militates against it. If the theory has any validity, it is strange that it has not been discovered before this during the forty-odd years of the career of adjudications by the Federal Courts concerning the searches of motor vehicles. It is also revealing to note that the Government's conduct at the time of the events in question was inconsistent with the theory, and that the District Court did not proceed on it.

II. Neither can the search of the car and the seizure of the registration card be justified (a) on the basis generally of the Metropolitan Police Regulation or (b) on the theory that at the instant the card was found, the officer was not making a search but was engaged solely in protecting appellant's property.

A. The Metropolitan Police Regulation in question mandates a "search" of all cars "taken from a prisoner." Even if one were to make the naive assumption that the sole

purpose of the Regulation, as applied to automobiles "taken from a prisoner," was the protection of their property, the fact would remain that the *effect* of the Regulation is quite different. The effect of the Regulation is to authorize a search of the effects of a person accused of crime under circumstances where that search is apt to result in the production of evidence against him. On this basis, the search without a warrant cannot be justified even under the authorities, relied on by the Government, permitting administrative health or safety inspections. The unvarnished truth of the matter is that the search which the Regulation purports to authorize is one which moves directly against a person accused of crime under circumstances where it is apt to turn up evidence of crime. Once this is recognized, it is pure cant to seek to justify the Regulation as based on the protection of the prisoner's property.

B. Nor is it possible to conclude, as the District Court did, that at the very instant the car was found, the officer was not engaged in a "search" and that accordingly the card was validly seized. The facts of the case are clear that the officer was engaged in a continuing process, one of the purposes of which was to make a search of the car, and indeed the District Court so found. When the incriminating evidence was found, protection of the car was quickly subordinated to incrimination of the prisoner. The approach suggested by the District Court would cause the judiciary to embark upon a rule which would be incredibly difficult of practical administration, resulting in constant psychological examinations of police officers in a futile quest of their motives as of a given instant. Moreover, whatever the officer's stated purpose, the precise action he took at the time of finding the card was calculated to advance a search of the vehicle, as indeed it did.

It must be remembered that no practical justification has been shown whatsoever in this case for the failure to obtain a search warrant. The entire argument of the Government is devoted to establishing novel bases of exception from the rule requiring a search warrant, in the absence of any demonstrated practical necessity for such exceptions. For the reasons we have stated, the suggested exceptions are ill-founded, and the District Court accordingly erred in permitting the fruit of the unlawful search to be received in evidence.

## ARGUMENT

### INTRODUCTORY

The basic text for the determination of the question in the case at bar is the Fourth Amendment which provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

It is popularly said that the Amendment forbids "unreasonable searches and seizures," but the fact of the matter is that it does not prohibit them in the abstract, or "at large;" thus, it is not an adequate constitutional justification for a search that under the circumstances making a search was a "reasonable" thing to do.

The Fourth Amendment, like much of the rest of the Bill of Rights, speaks in terms of a prescribed *procedure*. It lays down a mandatory procedure which must be fol-

lowed in order to justify a search or seizure. That procedure is the antecedent review of the "reasonableness" of a proposed search or seizure by an independent magistrate, upon an application for a warrant by the officers desiring to make a search or seizure.

There are doubtless innumerable situations where making a search or seizure might be, colloquially speaking, a "reasonable" thing to do; but that is not to say that the Constitution permits making such a search or seizure without a search warrant. See *Jones* v. *United States,* 357 U.S. 493, 497-99 (1958); *Agnello* v. *United States,* 269 U.S. 20, 33 (1925). Similarly, cases might be imagined where it would be abstractly "reasonable" to try a person for a federal crime without a jury, or to hold him to answer for an infamous crime without indictment by a grand jury; but the point of these provisions of the Bill of Rights is that there is a prescribed procedure that must be followed.

And likewise this is the basic point of the Fourth Amendment—it does not simply lay down a substantive standard of "reasonableness;" it also lays down an essential procedure for the making of the determination whether a search can be made or a seizure effected. The Supreme Court put this in striking terms in *Johnson* v. *United States,* 333 U.S. 10, 13-14 (1948), which it reiterated in *United States* v. *Ventresca,* 380 U.S. 102, 106 (1965):

> "The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive

> enterprise of ferreting out crime. Any assumption that evidence sufficient to support a magistrate's disinterested determination to issue a search warrant will justify the officers in making a search without a warrant would reduce the Amendment to a nullity and leave the people's homes secure only in the discretion of police officers . . . ."

Thus, the general principle of the Fourth Amendment is that searches of the people's "effects" and seizures of them may be undertaken only upon a warrant issued by an independent magistrate. Unless such a warrant is obtained, however "reasonable" on a subjective or even on an objective view a search or seizure might be, it is unlawful (absent certain recognized exceptions which we will deal with shortly), and matters obtained through it may not be used in evidence in a criminal prosecution. See *Aguilar* v. *Texas,* 378 U.S. 108, 115 (1964).

To be sure, as Mr. Justice Stewart put it in *Elkins* v. *United States,* 364 U.S. 206, 222 (1960), the course of the interpretation of the Fourth Amendment has not been "unrealistic or visionary," and even the requirement of the obtaining of a search warrant has not been construed as an absolute. The Supreme Court has recognized certain limited exceptions to the general rule of the Amendment that a search warrant may be obtained; under these exceptions, where applicable, a search may be lawful although conducted without a warrant if it is in fact "reasonable." But the cases are explicit in teaching that these "exceptions" are what the word implies, and are indeed restricted to "exceptional circumstances." See *Johnson* v. *United States,* 333 U.S. 10, 14 (1948); *McDonald* v. *United States,* 335 U.S. 451, 454 (1948). The exceptions from the mandate

that a warrant be obtained are "jealously and carefully drawn." *Jones* v. *United States,* 357 U.S. 493, 499 (1958).

It appears that for many years there was a misconception that the Fourth Amendment's requirement of a search warrant did not extend to searches of automobiles, and that automobiles were in some loose way to be considered a case altogether apart for the application of the Fourth Amendment.[1] In a landmark decision of two years ago, the Supreme Court put these notions to rest. *Preston* v. *United States,* 376 U.S. 364 (1964). In *Preston,* the police, in an arrest assumed to be lawful, arrested three men for vagrancy who had been seated in a motor car for five hours at night in a business district. The men had no means of support, had only twenty-five cents among them, could not produce papers for the car, and gave evasive and manifestly unsatisfactory accounts of their behavior. Upon their arrest, the police took the men to headquarters. "The car, which had not been searched at the time of the arrest, was driven by an officer to the station, from which it was towed to a garage." (376 U.S., at 365) With the car thus in police custody, a search of it was made, and various items were found in it which were given in evidence in a trial of the men for conspiracy to commit bank robbery.

The Supreme Court unanimously reversed the judgment of conviction and held that the search of the car and the seizure of the items given in evidence were unlawful because they were undertaken without a warrant and without justification under any of the exceptions which permit searches or seizures without a warrant. The details of the Supreme Court's analysis are of interest. The Court

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[1] Perhaps certain language in *Husty* v. *United States,* 282 U.S. 694, 700 (1931) led to this misconception.

put the basic question as follows: "we must inquire whether the facts of this case are such as to fall within *any* of the exceptions to the constitutional rule that a search warrant must be had before a search may be made." (376 U.S., at 367; emphasis supplied)

The Court reviewed the two recognized exceptions to the general principle that a search warrant must be obtained prior to the making of a search or seizure. These two categories of exceptions were (1) situations where a search is permissible as a contemporaneous incident to a lawful arrest (*Weeks* v. *United States,* 232 U.S. 383, 392 (1914); *Agnello* v. *United States,* 269 U.S. 20, 30 (1925); *Marron* v. *United States,* 275 U.S. 192, 199 (1927); *Harris* v. *United States,* 331 U.S. 145 (1947); *United States* v. *Rabinowitz,* 339 U.S. 56, 61-62 (1950); *Abel* v. *United States,* 362 U.S. 217, 235-36 (1960)); and (2) situations involving the "necessity" doctrine, where there is immediate danger that the matters to be obtained through the search or seizure will be removed from the jurisdiction or otherwise destroyed (see *Carroll* v. *United States,* 267 U.S. 132 (1925); *Brinegar* v. *United States,* 338 U.S. 160 (1949)). While the Court—obviously in the context of the second exception—observed that "[c]ommon sense dictates, of course, that questions involving searches of motor cars or other things readily moved cannot be treated as identical to questions arising out of searches of fixed structures like houses" (376 U.S., at 366), it made it clear that the application of the "necessity" doctrine in the case of automobiles applied only as long as the car remained in a condition of being able to be "readily moved." See 376 U.S., at 368.

The *Preston* case teaches that once an automobile has been impounded by the police, and taken away from the scene of the arrest, there is no basis for a search of it

and a seizure of things from it without a search warrant. This is because under these circumstances the search can no longer be said to be incident to an arrest, or to be justified by the "necessity" doctrine. The basic principles of *Preston* were more recently reaffirmed by the Supreme Court in *United States* v. *Ventresca,* 380 U.S. 102, 106-07 (1965).—Nonetheless, it is believed that searches generally continue to be made, without warrants, of cars impounded by the police in the District of Columbia, and as pointed out by the Government in its Petition for Rehearing in this case, there has been a considerable amount of litigation on this matter.[2] (Pet. Reh., p. 2)

The Government makes no serious suggestion here that it is possible to justify the search of appellant's car some hours after his arrest, at a place miles from the point of arrest, as "incident" to that arrest. Nor does the Government seek to justify the search on the grounds of the "necessity" doctrine—as again obviously it cannot since the car was in police custody at the time of the search.

Instead, the Government plainly asserts that the catalogue of exceptions in the *Preston*[3] case is not an exhaustive one, and attempts to justify the search on two

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[2] Indeed, the Government does not even seem to consider a change in police practice a thinkable alternative in this area. The only consequence which the Government forecasts if the original reversal of appellant's conviction ordered by a division of this Court is reinstated, is "the demise *in limine* of some otherwise meritorious prosecutions." (Pet. Reh., p. 8) The possibility of accommodations in police practice to the search warrant requirement —which obviously would not be difficult—and the securing of evidence through valid means is not mentioned.

[3] In the *Ventresca* case, likewise, only two exceptions were mentioned, the "necessity" doctrine and the search "incidental" to a lawful arrest. 380 U.S., at 107.

alternative new bases: (1) the theory that at the time of appellant's arrest his car was lawfully seized as an "instrumentality" of the crime of robbery for which he was arrested, and that this seizure, as a matter of law, amounted to a lawful seizure of all the contents of the car, investing the police with a power to go through the car at leisure and use in evidence anything they found within it; and (2) an argument based on the police regulation[4] providing for the "searching" and "securing" of vehicles impounded by the police, relied upon either (the Government's argument in these particulars is not clear) (a) as making the whole of the officer's search constitutionally proper, or (b) as making his conduct at the precise instant he found the incriminating registration card in the car constitutionally proper, regardless of what might have been the case had the card been found at other instants during the process of the officer's dealing with the car.

We submit that both of these purported justifications are without merit, and that the search of appellant's car and seizure of the card therefrom was accordingly unlawful.

## I. THE "INSTRUMENTALITY/CONTESTS" SEIZURE THEORY.

Apparently the principal reliance of the Government in this matter is on the "instrumentality/contents" theory which it asserted extensively in brief and oral argument in *Price* v. *United States,* —— U.S. App. D.C. ——, 348 F.2d 68, *cert. denied,* 382 U.S. 888 (1965), but where the

[4] The police regulation in question is Section 12, Metropolitan Police Department General Order No. 10, Series 1958. It is quoted at pp. 4-5 and 28.

judgment was affirmed, as the Government admits, on another ground.[5]

The logical steps in this argument are that the car was lawfully seized at the time of petitioner's arrest, by reason of a search "incidental" to his arrest; that this "seizure," as a matter of law, embraces not only the car but the contents of the car, regardless of what they are, and regardless of whether the officers making the seizure are conscious of the items in question or not; and that from this it follows that, having lawfully seized all the contents of the car, these contents may be gone through by the police at leisure thereafter.

1. *The "Instrumentality/Contents" Theory Narrowly and Improperly Restricts the Supreme Court's Holding in Preston.*—The first point that must be noted about the Government's theory is that it restricts the *Preston* doctrine to a very narrow category of cases. Doubtless because of this, it has been a favorite argument of the Government's in its attempt to minimize the effects of the *Preston* decision upon police practice. In effect, it restricts

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[5] The *Price* case, in the view of the division of the Court which decided it, involved simply a search incident to two arrests, that of the appellant and that of another person who was later arrested in appellant's car on the police station parking lot. The Court's theory was that since the items which were taken from the car and used in evidence against appellant had been all seen by the police at the time of the arrest, being in plain view in the car (except for one item which was later seized, the Court held, as an incident to the arrest of the second man), the seizure of them was a proper incident to the arrest of the appellant.

Whether or not the full Court is of the view that the *Price* case was properly decided on its own facts, the rationale of the Court's decision in that case sets it apart from the case at bar. (It should be noted that the undersigned *amicus curiae* was counsel for the appellant in the *Price* case.)

the application of the *Preston* case—which itself is limited, generally speaking, to cases where the automobile is in police custody[6]—further by limiting it to situations where the police custody of the automobile is itself illegal.

We must observe in passing at this point that the Supreme Court in the *Preston* case did not bother to look at the question whether the police custody of the car was itself lawful or not. If the legality of the police custody of the car were the touchstone, the Supreme Court in *Preston* indeed was guilty of a considerable indirection in approach, for which the Government appears to be berating it at the close of its Petition for Rehearing.[7] (Pet. Reh., p. 12) The indirection is this: If the seizure of an automobile as a matter of law involves the seizure of all its contents, as the Government suggests, presumably the Supreme Court should have said so in *Preston*. If the seizure of the petitioners' auto in *Preston* were unlawful, one would have thought, under the Government's theory, that that was the end of the matter and that the remainder of the Supreme Court's analysis could have been dispensed with. It is indeed a strange thing that the legality of the seizure of the car, which the Government now identifies

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[6] This is because the *Preston* case will have little applicability outside the situation where the auto is in police custody because, unless the car is in police custody, the "necessity" exception from the *Preston* doctrine will most likely apply; the car will be capable of being moved away.

[7] Thus, the Government makes the point that the construction of the *Preston* rule is not to be "allowed to end with its enunciation and that an expression in an opinion yields later to the impact of facts unforeseen." (Pet. Reh., p. 12, quoting from *Jaybird Mining Co.* v. *Weir*, 271 U.S. 609, 619 (1926).) But what is involved here is not simply an expression in an opinion in the *Preston* case, but the fundamental approach of the Court in deciding that case.

as the single dispositive factor, was completely ignored in the Supreme Court's decision.

But this is not how the Supreme Court's decision in *Preston* is to be read; and we submit it is a strained[8] and inadmissible way to read any Supreme Court decision. The real point, of course, is that the legality or illegality of the seizure of the car is irrelevant, under *Preston,* to its subsequent search. This is the teaching of the Court's approach in *Preston;* a car is "searched" when the officers go through it. A search and seizure of a car's contents does not take place when the car itself is seized. This is the common sense of the matter, "and common sense often makes good law." (*Peak* v. *United States,* 353 U.S. 43, 46 (1957)). Following the common sense of the matter, shortly after the *Preston* decision this Court declared that "a warrantless search of a car in police custody at a time after the occupants' arrest and under circumstances where there is no danger of removal is illegal." *Smith* v. *United States,* 118 U.S. App. D.C. 235, 238, 335 F.2d 270, 273 (1964).

As we have suggested, adopting the Government's contention would restrict the *Preston* holding, as a practical matter, to a trifling number of exceptional cases; at the most, those that would be left would be those in which the suspect made no use of his car as a means of transportation either immediately before, or after, the time of the commission of the crime. For, as the Government's approach indicates here, any use of the car after the crime to transport the person of the suspect away from the site

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[8] Similarly strained, we submit, would be a reading of the *Preston* decision as limited to, or specially relevant to, any particular sort of crime. Nothing in the Supreme Court's opinion supports any such construction, and even the Government does not contend for it.

of the crime makes the car, under the Government's theory, an instrumentality of the crime; and seizable as such without a warrant incident to the defendant's arrest if the defendant happens to be arrested close to his car.[9] Similar use before the crime would presumably have like consequences. It matters not, under the Government's theory, whether the car was a necessary means of transportation in making the "get-away," as the car in the *Price* case was said to be for the asportation of the heavy safe taken from the dry cleaning shop.—Here no heavy property was taken in the robbery, and the suspects could have as well fled on foot as in the car.—In all these circumstances, the Government would claim the right to seize the car without a warrant as an "instrumentality" of the crime, and, most importantly, would urge that that seizure as a matter of law in every case also amounted to a seizure of the contents of the car, permitting those contents to be gone through later by the police at leisure without a warrant.

The net effect is to negate the application of the *Preston* case in the majority of cases to which it applies—indeed, in every case in which the suspect used his car on or about the occasion at which the crime was committed, for in those cases it could be said that the car assisted the suspect, either in getting to the place where the crime was committed, or in going to some other place thereafter. The net area left for the application of the constitutional imperative taught by the *Preston* case—the necessity for the use of a search warrant for the search of a car in police custody—would be minimal.

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[9] It might be seizable without a warrant on some other theory, such as the "necessity" doctrine, as well.

2. *The Theory Negates the Requirement of Particularity.*—The Government's argument amounts to an assertion that, incident to an arrest, the Government may, by impounding the arrested person's car, be deemed to have seized the entire contents of that car—including contents of which the officers making the seizure are in no way aware, and contents themselves not lawfully subject to seizure.[10]

This is vividly demonstrated here. The police were not aware of the fact that the stolen registration card was in the car at the time they impounded it. Yet, under the Government's theory, they had at this time made a lawful seizure of the car, including the registration card, although they were not aware of the card's existence in the car. Similarly, the Government's theory leads to the conclusion that the officers at the time of the impounding of the car lawfully seized the contents of the glove compartment, although the fact of the matter is that they did not know what was in the glove compartment, and that, as it turned out, the only things in the glove compartment were the usual sort of innocent articles that people keep in their glove compartments, obviously not subject to seizure.

Thus, the Government's argument offends against the fundamental requirement of particularity in connection with the object of a search or in connection with the making of a seizure. If there is any main, dominant principle —apart from the principle of the necessity for a warrant—

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[10] The fact that the Government may have lawful possession of an object does not mean that it has a power to search its contents. The classic example is that of a first class letter which while in the course of the mails is in the lawful possession of the Post Office Department. But a search warrant is required to make a search of the letter's contents. See *Ex parte Jackson*, 96 U.S. 727 (1877); *Oliver* v. *United States*, 239 F.2d 818 (8th Cir. 1957), *cert. dismissed*, 353 U.S. 952 (1957).

that runs through the cases interpreting the Fourth Amendment, it is the need for *particularity* as a necessary ingredient of a lawful search or seizure. A general search or seizure is flatly at variance with the theory of the Amendment. The express language of the Amendment is the starting place. Even where a search or seizure is undertaken upon a warrant, that warrant must be one "*particularly* describing the place to be searched, and the person or things to be seized." This language has its roots in the experience in the revolutionary period—in the Colonists' abhorrence of the general "writs of assistance" which permitted untrammeled, unparticularized searches and seizures. "[T]he IVth Amendment was written against the background of the general warrants in England and the writs of assistance in the American colonies . . . ." Vinson, *J.*, in *Nueslein* v. *District of Columbia,* 73 U.S. App. D. C. 85, 87-88, 115 F.2d 690, 692-693 (1940); Douglas, *J.*, dissenting, in *Frank* v. *Maryland,* 359 U.S. 360, 376-82 (1959); Brandeis, *J.*, dissenting in *Olmstead* v. *United States,* 277 U.S. 438, 474, 476 (1928).

And so it is that even where a search is permissible, there are strict limits imposed upon the matters or things which may be seized under that search. Purely evidentiary materials cannot be seized—only those matters which are contraband, or are the fruits or instrumentalities of the crime. See *Gouled* v. *United States,* 255 U.S. 298, 310 (1921). "[N]or may the Government seize, wholesale, the contents of a house it might have searched." *Abel* v. *United States,* 362 U.S. 217, 235 (1960). The Supreme Court has held that, even where a search for items capable of lawful seizure is permitted, a general seizure cannot be undertaken for the purpose of amassing items to be looked through later at leisure in search of particular things which are capable of

lawful seizure. See *Kremen* v. *United States*, 353 U.S. 346 (1957). In *Kremen* the Court held that, incident to an arrest, the contents of the cabin in which the defendants were arrested could not be bundled off to an FBI office for further examination. Even though the items actually given in evidence would have been themselves subject to a lawful seizure at the time of the arrest (see dissenting opinion, 353 U.S., at 348), the illegality of the dragnet seizure was held to be enough to make those items inadmissible in evidence.

So, here, under the Government's "instrumentality/contents" theory, there was a general seizure of all the contents of the car—including contents not subject to seizure at all—thus amassing items to be looked through later at leisure in search of particular things which are capable of lawful seizure. The only difference from the *Kremen* case is that there the officers had to put the contents of the house into other containers for the purpose of accumulating them for a later inspection, whereas in this case the appellant's car, under the Government's theory, provides a convenient "package" for this purpose. But the result, we submit, in constitutional terms is the same, and equally offensive to the constitutional requirement of particularity.

The point can be vividly illustrated. If instead of seizing the car as an incident to appellant's arrest, the police had obtained a search warrant to look for and seize appellant's car pursuant to Rule 41(b)(2) of the Rules of Criminal Procedure, the warrant would have had to "identify the property" to be seized. (Rule 41(c)). If the warrant had simply specified the automobile, it is clear that the registration card could not have been seized under it. For the rule (Rule 41(e)(3)) makes it clear that it is grounds for a motion to suppress evidence that "the property seized

is not that described in the warrant"; and the cases are to the same effect, that it is forbidden to seize "one thing under a warrant describing another." *Marron* v. *United States,* 275 U.S. 192, 196 (1927). A car is not the same thing as a card; the only similarity is typographical. In order to search the car for the registration card or for the money or watch taken from the victim, a search warrant specifying those items was required. This is the clear application of the constitutional doctrine of particularity, as reflected by and implemented in Rule 41 of the Rules of Criminal Procedure. It would be paradoxical to apply a lesser standard to a search and seizure without a warrant.

3. *The Theory Is Based on False Analogy.*—It appears that the Government's argument is based on false analogy to the analysis of items which are lawfully seized by the police, such as the ballistic examination of bullets or the chemical examination of powders and the like which have been lawfully seized. (Gov't Br., pp. 8-9) The analogy is obviously unavailing. Common sense and every day experience, as well as the clear teachings of the *Preston* case, indicate that an automobile, like a home, is indeed a usual and customary repository of the "papers, and effects" of "the people" as specified in the Fourth Amendment. In our highly mobile society, people frequently keep items of value or of importance to them in the trunks, glove compartments or elsewhere within their cars. Once again, if the car was not in the constitutional sense a repository of the "papers, and effects" of the people, the analysis of the Supreme Court in the *Preston* case would have been entirely beside the point, and the only focus of its attention would have been the lawfulness of the seizure of the car in the first place—a question which the Supreme Court's opinion viewed as entirely irrelevant.

Once this is grasped, the question whether the car is an "instrumentality" of the crime becomes beside the point. It is clear that a house can be used as an instrumentality of a crime as well as a car; obvious examples aside, even bookmaking and numbers games are not conducted entirely *al fresco;* they generally have an indoor headquarters where the basic accounting and other central operations relating to them are carried on. In a real sense, these premises are an instrumentality of those crimes, just as much as a vehicle used to supply the transportation element in a crime is. But it would be absurd to infer from this, as the Government apparently concedes, that this would justify the police in sweeping up and seizing, without a warrant, all the contents of the premises. Indeed, this was the very practice held to violate the Constitution in *Kremen* v. *United States,* 353 U.S. 346 (1956). *Cf. Taylor* v. *United States,* 286 U.S. 1 (1932).

Against this, the Government suggests that the person of a citizen is often the repository of his "papers, and effects," and that the person and clothing of an arrested individual may be searched incident to his lawful arrest, without a warrant. (Pet. Reh., p. 6). And so the cases hold;[11] but obviously there can be no inference drawn from this, as the Government would, that the only repository of the papers and effects of the citizen that is constitutionally protected is the home.[12] As the courts have repeatedly indicated, and as the Supreme Court made plain in the *Preston* case, the rule permitting a search of the immediate person of an arrested individual stands on its own feet. It is justified

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[11] See, *e.g., United States* v. *Jeffers,* 342 U.S. 48, 51 (1951); *Johnson* v. *United States, supra,* at 14-15.

[12] Under the Government's view, the only possible other beneficiary of the constitutional protection is the house trailer. (Pet. Reh., p. 6).

"by the need to seize weapons and other things which might be used to assault an officer or effect an escape, as well as by the need to prevent the destruction of evidence of the crime—things which might easily happen where the weapon or evidence is on the accused's person or under his immediate control." *Preston* v. *United States, supra,* at 367. But the very point of the *Preston* case is that this rationale does not extend to permitting the search of automobiles at a time and place different from the arrest of a person connected with the automobile.

Indeed, the Government's argument is a revealing one. For absent a lawful arrest, a citizen's person or clothing may not be searched without a search warrant. See, *e.g.*, *Henry* v. *United States,* 361 U.S. 98 (1959). It is, then, *not* simply homes that enjoy the protections of the Fourth Amendment; as *Preston* and the other cases teach, other places, and the person and clothing of the citizen himself, which are characteristically the respositories of the citizen's papers and effects, enjoy that protection.

Cases of physical and chemical analysis of an object are quite different. A bullet which is subjected to ballistic analysis, a powder which is subjected to a chemical analysis, or a shirt whose stains are analyzed, is not a repository for the "papers, and effects" of the people. Analyzing or examining these objects is not, in language or in law, a "search." On the other hand, an automobile, like a house, is an enclosed space into which people enter and in which they keep their effects. This factual distinction is the basis for the application of the Fourth Amendment.

4. *The Lack of Precedent for the Theory Counsels Against It.*—While the theoretical structure of the "instrumentality/contents" theory is so weak, as demonstrated

above, as to dictate that it cannot be accepted, the apparent total lack of precedent for the theory as applied to automobiles also points to its questionable character. Over a forty-year period, the Supreme Court and the federal appellate courts have decided a long line of cases involving automobile searches[13] without the doctrine ever having been discovered before. This in itself is a counsel against its validity. *Cf. Romero* v. *International Terminal Operating Co.*, 358 U.S. 354, 369-71 (1959).

Indeed, the District Court here did not rely on the "instrumentality/contents" theory, and the Government's conduct here was inconsistent with the theory. For the record indicates that after the officer who searched appellant's car found the registration card and delivered it to the police property clerk at the precinct station, the Government felt it necessary to obtain a search warrant specifying the card and directed to the property clerk. If the Government's afterthought theory of an "instrumentality/contents" seizure were valid, there would have been no need for this action inasmuch as, if the Government's theory is right, "the limits of the requirements of the Fourth Amendment were simultaneously reached and no further constitutional compliance problems remained vis-a-vis the vehicle. The police could handle the car in any way they saw fit . . . . With the property properly in police custody, it could be examined at will without any need to obtain a warrant or act promptly." (Gov't Br., p. 8). We suggest that the Government's practical disinclination to act in accord-

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[13] See, *e.g.*, *Carroll* v. *United States*, 267 U.S. 132 (1925); *Husty* v. *United States*, 282 U.S. 694 (1931); *Scher* v. *United States*, 305 U.S. 251 (1938); *Coupe* v. *United States*, 72 U.S. App. D.C. 86, 113 F.2d 145 (1940), *cert. denied*, 310 U.S. 651 (1940); *Brinegar* v. *United States*, 339 U.S. 160 (1949).

ance with the "instrumentality/contents" theory was well founded.[14]

## II. THE ALTERNATIVE THEORIES OF JUSTIFICATION FOR THE SEARCH OF THE CAR AND THE SEIZURE OF THE REGISTRATION CARD WITHOUT A WARRANT.

The Government also relies on an alternative theory or theories in seeking to justify the search of appellant's car in the police precinct lot and the warrantless seizure of the registration card found in it. Under one variant of this theory, the Government's contention would make the rule of the *Preston* case a complete nullity; in its other variant, the Government's theory would apparently restrict the application of that rule to a substantial degree, and make judicial decision turn on artificial psychological distinctions as to the searching officer's intent at a particular instant.

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[14] The Government suggests that the decisions in *Burge* v. *United States*, 342 F.2d 408 (9th Cir.), *cert. denied*, 382 U.S. 829 (1965), and *Drummond* v. *United States*, 350 F.2d 983 (8th Cir. 1965), furnish support for the "instrumentality/contents" theory. Both cases involved searches of cars which had been seized and were subject to forfeiture as contraband carriers under 49 U.S.C. § 782. While we do not concede the correctness of these decisions, they appear to turn on the statutory scheme for forfeiture provided in § 782, which destroys private property rights in the automobiles. See 342 F.2d, at 414; 350 F.2d, at 988. The two opinions appear to suggest a suspension of property rights in the automobiles prior to the institution of the libel proceeding to "declare" the forfeiture; and indeed the text of the statute appears to support this view. In fact, one case suggests that property rights are extinguished in the vehicle at the time of its *use* as a contraband carrier. See *United States* v. *One 1952 Ford Victoria*, 114 F. Supp. 458, 459 (N.D. Cal. 1953), cited in the *Burge* decision, 342 F.2d, at 414. Obviously, there is no provision in the Criminal Rules or elsewhere destroying property rights in a so-called "getaway car." *Cf. United States* v. *Jeffers*, 342 U.S. 48, 52-53 (1951) (destruction of property rights in narcotics does not legalize warrantless search in premises for them).

A. The first alternative of the Government's theory is that Section 12 of Metropolitan Police Department General Order No. 10 validly provides for warrantless searches of impounded automobiles and, as applied to situations like this case, is not only not violative of the Fourth Amendment, but in some degree furnishes constitutional support to the police practice of searching cars without a warrant.

The provision in question reads in pertinent part:

> "When a vehicle is brought to a station, whether impounded, stolen, abandoned, or *taken from a prisoner,* it shall be the responsibility of the officer who takes the vehicle in charge to *thoroughly search* such vehicle, including the glove compartment and trunk, and remove all property therefrom. He shall be responsible for seeing that all such property is recorded and properly safeguarded." (emphasis supplied)

In support of its theory that searches made pursuant to this regulation are not violative of the Fourth Amendment despite the failure to obtain a search warrant, the Government appears primarily to rely upon *Frank* v. *Maryland,* 359 U.S. 360 (1959), a five-to-four decision of the Supreme Court holding a warrantless search of premises in connection with a health inspection to be consistent with the Fourth Amendment.[15] (See Pet. Reh., p. 10)

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[15] The Government also cites *Stroud* v. *United States,* 251 U.S. 15, 21-22 (1919), on behalf of the constitutionality of the regulation providing for a search without a warrant, as applied here. (Pet. Reh., p. 10) But *Stroud* turns entirely upon the fact that the person whose letters were inspected was an inmate of a penitentiary (the crime was, indeed, committed when he was such), and turns simply on whether the rule providing for inspection of prisoners' outgoing letters was a reasonable one. 251 U.S., at 16, 21. The Bill of Rights does not apply in plenary fashion to persons who are in penitentiaries under lawful sentences; indeed, the

But the *Frank* case is clearly no justification for the Government's argument, and indeed clearly points to its rejection. We can put to one side questions of the application and validity of the regulation in cases of the search of vehicles impounded by the police as stolen or abandoned. The coverage of the regulation is not restricted to these instances; the regulation in its terms applies to automobiles "taken from a prisoner," and this is the application with which we are concerned in this case.

The essential theory of the majority opinion in the *Frank* case was that the protections of the Fourth Amendment against warrantless searches and seizures and those of the Fifth Amendment against self-incrimination were to a considerable extent *in pari materia*. The Court pointed out that one of the basic purposes of the Fourth Amendment was:

> "self protection: the right to resist unauthorized entry which has as its design the securing of information to fortify the coercive power of the state against the individual, information which may be used to effect a further deprivation of life or liberty or property." (359 U.S., at 365).

The Court further observed that:

> "[H]istory makes plain, that it was on the issue of the right to be secure from searches for evidence to be

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very concept of incarceration involves a deprivation or suspension of one's civil rights. However, except in a police state, the same principles are not applicable to persons who are not incarcerated. While it might have been permissible for the Government to inspect articles which appellant desired to have with him in jail after his arrest, see *Abel* v. *United States*, 362 U.S. 217, 238-39 (1960), the contents of his car were not in this category.

used in criminal prosecutions or for forfeitures that the great battle for fundamental liberty was fought." (*Ibid.*)

Since the Court found that there was no purpose implicit in the health inspection in the *Frank* case looking toward the seizure of evidence for criminal prosecution, the warrantless search there involved was held not to violate the Fourth Amendment.[16]

But searches made under the police regulation here, at least to the extent they involve automobiles "taken from a prisoner," clearly and inescapably involve the obtaining of evidence for use in prosecuting crimes. The fact that a man is a prisoner means, one hopes, that there is probable cause that he has committed a crime. An automobile taken at the time of his arrest is an obvious place in which to look for evidence of the crime. This, of course, is precisely what the search in question here turned up.

We submit that the conclusion follows that such a search may not be undertaken, where the car is "taken from a prisoner," regardless of what the dominant motive of the police might be in making a particular search or in promulgating the regulation in question. Indeed, even the incredible suggestion in the record (Tr. 73) that the "sole" purpose of the regulation is to safeguard property can lead to no other conclusion. Even if such a suggestion as to the sole purpose of the procedure is made in good faith, it is hopelessly naive in terms of the procedure's effect.

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[16] The four dissenters, of course, did not question that the Fourth Amendment was applicable in the case of a search for evidence of a crime, but dissented on the basis that the requirement of a warrant was applicable even in the case of an administrative search which did not have as one of its purposes the discovery of evidence of crime.

The objective facts of the matter are that the regulation operates directly upon a person accused of crime; and it operates to authorize a warrantless search in a context where evidence of crime is apt to be found. It is difficult to find a search more inconsistent with the guarantees of the Fourth Amendment as explained in *Frank*. The Government's suggestion that the sole purpose of the search is to protect property and not to turn up evidence should be treated with no greater respect than any attempt to disclaim the natural and probable consequences of a person's acts. When a car "taken from a prisoner" in connection with his arrest is searched, a natural and probable consequence is that evidence may be turned up. Whatever may be argued to be the Regulation's *purpose*, its natural *effect* is plain.

We submit that once this is recognized, any attempt to justify the warrantless search as a measure to protect the prisoner's property is mere cant. In the first place, on its face the regulation is inconsistent with this rationalization, because it provides for a search through the closed areas of the car—the glove compartment and trunk—and the record here makes it plain that these areas are searched even though they are locked, even if it means entering the trunk by cutting through from the rear seat. (Tr. 106, 164) It would take a quixotic thief to try to go to similar lengths to commit pilferage from a car sitting in the police station lot.

Moreover, even if the purpose of the search is partly benign, and the search has as one of its elements—or even its dominant element—the protection of the prisoner's property, the fact remains that it is a search to which the prisoner has not consented, but which is apt to turn up

evidence against him. (See Tr. 72) If the prisoner desires to have his property protected, presumably he can so advise the arresting officers. There is no indication on this record that the appellant consented to the attempts by the police, if that is what they were, to protect his property. To say that the police are privileged to engage in an action which has the effect of protecting the prisoner's property, whether he likes it or not, by taking an action which is also calculated to develop evidence against him, is to articulate the sort of "Big Brother" concept of the state against which the Constitution has set its face. The claim of solicitude for the appellant's property sounds strange when it is made to justify a search whereby he is to be deprived of his liberty.

There is some suggestion by the Government that unless action is taken by the police (even in the case of automobiles "taken from a prisoner") along the lines of Section 12 of Police General Order No. 10, the police or the District Government will be held responsible in damages for not protecting the property of persons whose cars are impounded. (Gov't Br., p. 10) But the argument clearly begs the question; a person can hardly be held liable in damages for not doing something the Constitution forbids him to do. If there is any problem as to making the choice clear to an arrested person, he could be advised that his automobile's contents will not be taken into the stationhouse for safekeeping except to the extent that he authorizes the police in writing to go through his car for this purpose.

B. The other aspect of this argument made by the Government in support of the lawfulness of the search and seizure involved here is apparently the ground on which

the District Court proceeded.[17] The District Court undertook to fragment the process whereby the officers went through appellant's car into moments when there was a motive to look for evidence and those in which there was not. The District Court held that at the time the officer found the registration card he was engaged simply in protecting the car from the elements, in that he was opening the right front door to roll up the window to protect the car from the rain that was falling, and that at that instant he was not engaged in searching the car either for valuables to protect or for evidence. Accordingly, the District Court held that there was no violation of the Fourth Amendment involved in the seizure of the registration card.[18]

The Government does not strongly stress this basis of justification for the seizure in this Court. We are unaware

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[17] The Government suggests (Gov't Br., p. 4) that the District Court also justified the seizure of the registration card in the light of the Police Department Regulation. It is, however, erroneous to read the District Court's colloquial opinion, which in fact refers to the regulation (Tr. 260-61), as doing anything more than stating that, with respect to the precise actions the officer was engaged in at the time he came upon the card, the regulation was confirmatory of the propriety of the seizure. The District Court repeatedly indicated that it was not called upon to hold that the regulation was valid in any and all circumstances. (Tr. 260, 261)

[18] Obviously, the so-called "plain view" doctrine does not assist the Government here. That doctrine applies only where the officer's view of the item is not itself occasioned through an unlawful search. Otherwise, the Fourth Amendment would be restricted in its coverage to the rare and somewhat hard to imagine case where the officer seizes something without previously seeing it. Moreover, the "plain view" doctrine does not, in any event, authorize a seizure of the item seen; it simply permits the officer to testify as to his sense impressions of the item which he saw, not to seize it as a basis for obtaining further sense impressions. See *United States* v. *Lee*, 274 U.S. 559, 563 (1927); *Ker* v. *California*, 374 U.S. 23, 42-43 (1963). To the effect that mere sight, even lawfully obtained, of an article subject to seizure does not authorize its seizure without a warrant, see *Taylor* v. *United States*, 286 U.S. 1 (1932); *McDonald* v. *United States*, 335 U.S. 541 (1948).

whether this is because it desires to have the conviction below affirmed on a broader basis, which will more completely negate the applicability of the *Preston* case, or whether the Government is sensitive to the infirmities of the District Court's theory; either reason would be credible.

In any event, the District Court's rationale for the legality of the seizure of the registration card cannot be sustained. The whole process of going through the appellant's car proceeded from a number of motives. The District Court well observed that:

> ". . . I feel compelled to find these as facts for purposes of this motion. He [the officer] went out to the automobile to do several things: to tag the car, to roll up the windows, to lock the doors, and to, if you want to call it, search, to go through the automobile to see whether or not there was any valuable property in it . . . ." (Tr. 241)

and the District Court observed:

> "he says very plainly that he had all these things in mind; and before he finished with the vehicle on this particular day, I think it was his conclusion which the evidence compels that he intended to see that all these things were done; and they were all done, because eventually he even looked in the trunk." (Tr. 242)

As we have suggested above, the search for valuables to protect cannot be separated from the search for evidence to prosecute; and, as the District Court recognized, the police officer was throughout engaged in one continuous operation which had as its purposes not only the rolling up of the windows and the locking of the doors, but the searching of the car; a "continuing series of events." *Price*

v. *United States, supra,* —— U.S. App. D.C. ——, 348 F.2d, at 70.[19]

Indeed, the interrelationship of all these elements is plain. The District Court expressed the view that the police officer momentarily was engaged purely and simply in rolling up the windows of the car to protect it from the light rain that was falling when he happened upon the registration card. But the record also makes it plain that the reason why the windows had not been previously raised by the crane operator who brought the car in was that the operator did not wish to interfere with the use of the car for evidentiary purposes, that is, with fingerprints that might have been on the car (Tr. 139, 163). Indeed, the officer's testimony was clear that he happened upon the card as part of the search he was making:

> "Q. As I understand, Officer, after having tagged the car, you went rather carefully through the interior of the car, is that correct?
>
> "A. Yes, sir.
>
> "Q. Why didn't you go into the trunk at that time?
>
> "A. I was in the process of making the search of the interior and I hadn't got to the trunk. My search

[19] This distinguishes this case from *Fagundes* v. *United States,* 340 F.2d 673 (1st Cir. 1965), where in the act of preparing to take an impounded car to the stationhouse, an officer saw certain valuables—which later developed to consist of stolen goods—incident to closing the windows of the car to protect it from the elements. The court was careful in pointing out that this was not done incident to a search of the car: the officer "did not return to the Barton car for the purpose or with the intention of searching it. Nor when he got there did he rummage in the glove compartment or pry into the trunk . . ." 340 F.2d, at 676. By contrast, the officer here was acting pursuant to a police regulation which expressly mandates a "thorough search" of an automobile, and was engaged in such a search, which included looking through the glove compartment and the trunk, when he found the registration card.

was interrupted by this piece of evidence that was lying in the door jamb." (Tr. 169).

Obviously, the officer was engaged in the continuing process of what is called an "inventory search" when he opened the door and found the registration card. But, as we have indicated, because one of the undeniable effects of an inventory search of an automobile in the case of a car "taken from a prisoner" is to obtain evidence against him, an inventory search is not permissible under these circumstances without a valid search warrant.

To attempt to fragment out a few seconds from the search, those seconds when the officer found the card, and to say that they were not part of the search is to engage in a stultifying exercise and to embark upon a rule which would be incredibly difficult of practical administration, resulting in constant psychological examination of police officers in a futile quest for their motives as of a given instant.[20] The present record is illustrative. Here the police officer, immediately before he found the registration card, had been in the front seat of the car going through the contents of the glove compartment. He indicated that it was "possible" for him to have rolled up the right front window from where he sat going through the glove compartment. Instead, the officer walked around to the other side of the car and opened the door for the purpose of rolling up the window. It was then that he saw the item of evidence in question. While the specific location of the card—on the door jamb and underneath the door itself—might be an unusual one, common experience teaches that papers and other loose things frequently are found in cars between the right front door and the side of the front seat.

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[20] The hearing of the Motion to Suppress here occupied more than two trial days.

Most drivers have had the experience of papers or small articles, placed on the front seat while driving without a passenger in the front seat, slipping to the side while the car is in motion and lodging between the seat and the right front door. No careful search of an automobile would omit opening the front door and looking in this location, and the officer's search here did not. Whatever the officer's stated purpose, the precise action he was taking at the time of finding the card was calculated to advance a search of the vehicle—as indeed it did. In the light of this, and the admitted fact that the officer was generally engaged in making a search of the vehicle at the time the discovery occurred, we submit that there is no basis for concluding that the finding of the registration card did not stem from a search of appellant's motor vehicle; and for the reasons previously stated, we submit that that search could not have been constitutionally undertaken without a warrant.

* * * * *

One final word seems appropriate to put the issues in this case in perspective. The Fourth Amendment implies a procedure—the obtaining of a search warrant—as a condition upon a valid search or seizure. The exceptions to that requirement which have been judicially recognized—the incidental search doctrine, applicable where an arrest is made, and the doctrine of "necessity"—both have their origins[21] in practical considerations. As the Supreme Court observed in the *Preston* case, the rule allowing searches in connection with a lawful arrest finds its justification:

> "by the need to seize weapons and other things which might be used to assault an officer or effect an escape . . . . " (376 U.S., at 367)

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[21] Though perhaps not their outside limits. See *Adams* v. *United States*, —— U.S. App. D.C. ——, 336 F.2d 752 (1964); but see *United States* v. *Marrese*, 336 F.2d 501 (3d Cir. 1964).

And the "necessity" doctrine, applicable generally to moving cars, is based on comparable practical considerations. But the brief of the Government here, and its Petition for Rehearing, may be searched in vain for any indication of a practical reason why it is not feasible to obtain a search warrant in a situation like the present one. There was certainly time to obtain one; there was no reason, in terms of protection of the officers or fear of destruction of the evidence, why the officers could not have waited until a warrant was obtained. If there was no probable cause to search the appellant's car, so that a warrant could not have been obtained, it should not have been searched; if there was such probable cause, it should have been the basis for an application for a warrant, where the existence of probable cause would have been independently determined. The only conclusion is that the Government, in these cases, seeks to put a higher value on a most minor administrative convenience than on the procedure specified in the Constitution.

## CONCLUSION

For the reasons stated, the undersigned *amicus curiae* submits that the judgment of the District Court should be reversed.

Respectfully submitted,

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*Of Counsel:*

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Washington, D. C.

April, 1966

# United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT



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No. 19,256



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JAMES H. HARRIS, APPELLANT

*v.*

UNITED STATES OF AMERICA, APPELLEE

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## PETITION FOR REHEARING EN BANC

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### I. Preliminary Statement

Appellant's robbery conviction was reversed by a two-judge division of this Court on November 19, 1965.[1] The opinion, in appellee's judgment, erroneously extends *Preston* v. *United States*, 376 U.S. 364 (1964), to a set of facts not within the contemplation of the Supreme Court's ruling. For this reason and because the opinion establishes a binding precedent for future cases before this Court on a point of law never decided either by the Supreme Court or by this Court,[2] having important im-

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[1] Senior Circuit Judge Washington heard argument in the case but did not participate in the decision.

[2] The instrumentality seizure theory was fully explored in the briefs and during oral argument in *Price* v. *United States*, —— U.S. App. D.C. ——, 348 F.2d 68, *cert. denied*, 382 U.S. 888 (1965), but the judgment was affirmed on another ground.

plications for the administration of criminal justice in that warrantless searches of vehicles by the police in similar "reasonable" circumstances will inevitably recur,[3] appellee respectfully urges the Court to rehear this case *en banc*.

A brief summary of the relevant facts is included for the convenience of the non-division members of the Court.

## II. Facts

After Police Officer Casmir Morda observed appellant and two other men leaving the robbery scene in a 1953 green Ford with District license tag number 2X751, he telephoned the Sixth Precinct and described the getaway car. He also wrote the tag number down on a piece of paper, G.X. 3. The following morning he turned the written tag number, G.X. 3, over to Detective Baker and also described the robbers to him (Tr. 335-337, 345). Later that day after Baker saw appellant enter the getaway car on the driver's side he arrested him (Tr. 32-33, 44, 65). Appellant was ordered out and searched (Tr. 45). Officer Baker then looked into the car and saw only an open beer can; he may also have reached under the front seat for weapons (Tr. 61-62, 77). At the same time appellant was arrested a fellow officer arrested Jerry Hines—a co-defendant acquitted at trial—as Hines attempted to enter his car after having parted company

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[3] The applicability of the *Preston* rationale is a question which has frequently arisen in this jurisdiction before. See *Adams* v. *United States*, 118 U.S. App. D.C. 364, 336 F.2d 752 (1964), *cert. denied*, 379 U.S. 977 (1965) (Affirmed); *Smith and Anderson* v. *United States*, 118 U.S. App. D.C. 235, 335 F.2d 270 (1964) (Remanded with directions); *Price* v. *United States*, *supra* (Affirmed); *Bowling* v. *United States*, —— U.S. App. D.C. ——, 350 F.2d 1002 (1965) (Reversed); *Jefferson and Cooper* v. *United States*, —— U.S. App. D.C. ——, 349 F.2d 714 (1965) (Affirmed); *Pettas* v. *United States*, 203 A.2d 170 (D.C. App. 1964) (Affirmed), *pet. for allowance of appeal denied*, No. 18884, October 30, 1964.

The following two cases, presently in various stages of appellate review, also appear to involve a *Preston* point: *Ray Jones, Jr.* v. *United States*, No. 19513; *James H. Hargrove* v. *United States*, No. 19614.

with appellant (Tr. 84-85). At the time of appellant's arrest Detective Baker decided to seize the car "as evidence" in the case because it was the very car described in the robbery outlook (Tr. 34, 68). Hines' car was not impounded because Detective Baker had no information connecting that car with the robbery (Tr. 182, See Tr. 98).

> [By defense counsel]
>
> Q. Why was Mr. Harris's car impounded and not Mr. Hines?
>
> A. Mr. Harris's car was described in the lookout, wanted in connection with the robbery, and so forth, and that is why his car was impounded.
>
> Q. Did you consider the vehicle to be evidence?
>
> A. Yes, sir. (Tr. 182.)

Accordingly, a few minutes after the arrest Baker called for a police crane to remove appellant's car to the Sixth Precinct while he and his partner took appellant and Hines there in the cruiser (Tr. 34, 36). About an hour and a half later the crane operator informed Baker that the car had been placed on the precinct lot, an area easily accessible to the public (Tr. 37, 38, 69-70, 87, 163).[4] The operator told Baker that it was raining out, but that he hadn't closed the windows, so Baker proceeded outside to lock the car and take care of protecting it against the rain as well as to put a property tag on it, identifying it in accordance with police practice dictated by General Order No. 10, Series 1958, Sections 11 and 12 (Tr. 38-39, 71-72, 163). The officer also wanted to remove all valuables wherever they might be found in the car, and list them on the property book per police regulations (Tr. 164). While he was thus securing the vehicle Detective Baker came upon the robbery victim's automobile registration card which rested on the threshold under the right

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[4] The record also indicates that from the time Detective Baker decided to seize the car incident to appellant's arrest until it was brought to the precinct lot, an hour and a half later, the vehicle was in constant police custody (Tr. 48, 51-52, 59-60).

front door of appellant's car. It was exposed when he opened the door. (Tr. 165-167. See Tr. 40.)

## III. Argument

The precise reasons for which the division rejected the Government's instrumentality seizure theory are not clearly stated in the opinion. *Ex necessitate* the opinion holds either that A. appellant's car was not lawfully seized incident to his arrest or, B. even if it was so properly taken into custody a later search of it could not validly proceed without a warrant.

### A. *Lawfulness of the car's seizure as an instrument of crime.*

Since appellant's car enabled him to make a quick getaway and was essential to the successful asportation of the fruits of the robbery, it was an integral part of the scheme and thus properly characterized as a means of committing the offense within Rule 41(b), Federal Rules of Criminal Procedure. It is indistinguishable as such from the rubber-heeled "getaway shoes" held validly seized incident to appellant's arrest in *United States* v. *Guido*, 251 F.2d 1, 3 (7th Cir. 1958). Indeed, appellant did not contest the lawfulness of the car's seizure before Judge Robinson.

> "I have to concede that the seizure of this automobile at the time he was arrested was valid." (Tr. 236.) (Appellant speaking through retained trial counsel.)

This concession was apparently relied on by the trial court when it ruled lawful the ensuing seizure of the registration card (Tr. 260).

One portion of the instant opinion which seems to argue against this result is the statement that validation of the instrumentality theory would "carve" another exception from the general rule against searches without warrants and that extant exceptions to the rule that personalty

may only be invaded after a magistrate has issued a warrant are dictated by practical necessity; a factor not supplied by appellee's theory of the seizure. (Slip op. at 7-8.)

The instrumentality theory, we submit, does not "carve" an *additional* exception to the general rule, it is merely the application of long settled principles of law to the seizure of but another instrument of crime. Neither logic nor expediency demand the insulation of getaway cars from the firmly established "seizure incident to arrest" concept; the law of searches and seizures was not immutably fixed as of 1791 and should be flexible enough to allow the police to cope with the *modus operandi* of the modern day criminal. Nor, as is suggested by the opinion, do the exceptions to the general rule rest upon a foundation of "practical necessity." The police have an absolute right to search for and seize instruments of crime incident to a lawful arrest. *Harris* v. *United States*, 331 U.S. 145 (1947); *Abel* v. *United States*, 362 U.S. 217 (1960). This proposition was only recently affirmed by this Court in *Adams* v. *United States*, *supra*, 118 U.S. App. D.C. at 365, 336 F.2d at 753.

In one of the most far-reaching and novel passages of the opinion, the division seemingly exempts getaway cars from the normal operation of the rules governing searches and seizures of personalty by equating them with houses and affording such cars the same degree of protection thrown about the home. (Slip op. at 8.) To our knowledge this is the first time that any court has posited that analogy which, in effect, fashions a fundamental change in the law as previously announced and recently adhered to by the Supreme Court.

> "Common sense dictates, of course, that questions involving searches of motorcars or other things readily moved cannot be treated as identical to questions arising out of searches of fixed structures like houses. For this reason, what may be an unreasonable search of a house may be reasonable in the case of a motorcar." *Preston* v. *United States*, *supra*, 376

U.S. at 366-367. *Accord Carroll* v. *United States*, 267 U.S. 132, 147 (1925).

In light of the historical basis of the Fourth Amendment the fear expressed in the opinion that "if an automobile used as an instrumentality of crime can be subjected to a general search without a warrant at the pleasure of the police, a home said to be so used could be subjected to the same treatment" (slip op. at 8), is not well founded. For the Government would be hard pressed indeed to argue, aside from the impracticability of the situation, that a home—the object at the core of the Fourth Amendment's protection—could ever be seized, *in toto*, as an instrument of crime and then searched at the pleasure of the police. The argument would simply not stand up.[5] *Kremen* v. *United States*, 353 U.S. 346 (1957). See *Taylor* v. *United States*, 286 U.S. 1 (1932); *Ford and Kimble* v. *United States*, Nos. 17835-6, August 24, 1965 (*en banc*); *Semayne's Case*, 5 Co. Rep. 91a, 77 Eng. Rep. 194 (K.B. 1603); 18 U.S.C. § 3109.

Nor is there reason to believe that automobiles are any more the repositories for " 'the papers, and effects' of 'the people' " (slip op. at 8), than are the "people" themselves, whose wallets and purses are normally filled with all manner of personal papers and effects, and yet, a valid arrest of the person brings his "papers, and effects" into the lawful custody and control of the police. *People* v. *Chiagles*, 237 N.Y. 193, 142 N.E. 583 (1923) (Cardozo, J.); *Robinson* v. *United States*, 109 U.S. App. D.C. 22, 283 F.2d 508, *cert. denied*, 364 U.S. 919 (1960).

Since appellant's car was an instrumentality of crime within Rule 41(b), Federal Rules of Criminal Procedure —a characterization apparently accepted by the division— and thus subject to seizure in its entirety pursuant to warrant, *a fortiori*, it was validly seized incident to appellant's concededly lawful arrest.

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[5] House trailers, of course, might present other questions.

**B. *Lawfulness of the precinct search of appellant's car.***

Whereas appellant's car was lawfully seized, its later examination at the precinct at a time when it was in the *lawful dominion and control* of the police was likewise valid for no trespass against the property was committed by that examination. This was not a "search" within the meaning of the Fourth Amendment. It is this concept of a non-trespassory examination which validates the testing of lawfully seized guns, narcotics or any other property at police laboratories without the prior approval of a magistrate.[6]

The opinion appears to reject the application of this well accepted premise to getaway cars when it states that such a later warrantless search "undermines the protection the particularity requirement normally affords." (Slip op. at 8.) As we understand the particularity requirement, however, it solely concerns objects *not yet* lawfully searched for and seized. It has no application to an instrument of crime lawfully taken into custody which is later examined. *Kremen* v. *United States*, *supra*, cited in the opinion, is not authority to the contrary. That case stands for two propositions, the continued validity of which we do not challenge:

1) The right to search a house incident to an arrest is limited and does not authorize an exploratory seizure of everything therein.
2) That limited right of incidental search is not expanded by the device of seizing the entire contents of a house to allow the officers a later more convenient examination of the mass of evidence. Once the *incidental right to search* a house has passed, that ends the matter.

*Kremen* does not purport to limit the authority of the police to examine a lawfully seized instrument of crime at another time and another place, that question was

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[6] For a more complete analysis of why a validly seized instrument of crime can be later examined without further warrant, see appellee's brief in *Price* v. *United States*, *supra*, at 8-10.

never considered nor comprehended within the facts of the case.

Furthermore, in appellee's judgment, the instant decision is in direct conflict with the recent holding of the Ninth Circuit in *Burge* v. *United States*, 342 F.2d 408 (9th Cir), *cert. denied*, 382 U.S. 829 (1965). That case sustained a search of a vehicle seven days after it had been seized pursuant to 49 U.S.C. § 782. However, the particular basis upon which a vehicle is *lawfully* seized is immaterial to the consequences flowing therefrom; in *Burge* it was probable cause to believe that the car had carried narcotics and in the instant case it was probable cause to believe that the car was an instrument of crime and seizable as such pursuant to Rule 41(b). In both cases when the automobiles were later examined and incriminating evidence found, they were in the "lawful custody" of the authorities.[7] (342 F.2d at 414). *Accord*, *Drummond* v. *United States*, 350 F.2d 983, 987-988 (8th Cir. 1965); *Sirimarco* v. *United States*, 315 F.2d 699 (10th Cir.), *cert. denied*, 374 U.S. 807 (1963).[8]

> "If the agent's version is to be accepted, the car's search following the seizure, when it had remained in continuous and proper government custody, was

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[7] It is apparent from the opinion in *Burge* that at the time the evidence was found, the car had not yet been declared forfeited in an *in rem* libel proceeding. (342 F.2d at 414.) As to those proceedings under 49 U.S.C. §§ 781-788, see *Colonial Finance Co.* v. *United States*, 210 F.2d 531 (6th Cir. 1954); *United States* v. *One 1951 Cadillac Coupe*, 139 F.Supp. 475 (E.D. Penn. 1956); *United States* v. *One 1952 Buick Special Riviera Auto*, 136 F.Supp. 253 (D.C. Minn. 1955).

[8] *Price, supra*, and *Bowling, supra*, also conflict with each other—both in their results and theoretical approaches to these so-called car cases. The opinion's treatment of those two cases leaves little room to doubt, however, that the division is exhorting the District Court to be guided by the more stringent *Bowling* test in future rulings. While this may result in uniformity of judgment below, and thus in the demise *in limine* of some otherwise meritorious prosecutions, it is far from clear, after comparison of the relevant precedents, that the *Bowling* decision reflects the viewpoint of a majority of this Court *en banc*.

not an unreasonable one within the prohibition of the Fourth Amendment. . . ." *Drummond, supra,* at 988.

In addition, the examination of appellant's car was especially reasonable herein because Detective Baker was proceeding pursuant to a police regulation—not invalidated by the division—when he found the evidence in question. Metropolitan Police Department General Order Number Ten, Series 1958, issued pursuant to the authority vested in the Chief of Police or his delegates pursuant to Reorganization Order for the District of Columbia, No. 46, Title I, Administration, Appendix, D.C. Code, provides in pertinent part of Section 12:

> "When a vehicle is brought to a station, whether impounded, stolen, abandoned, or taken from a prisoner, it shall be the responsibility of the officer who takes the vehicle in charge to thoroughly search such vehicle, including the glove compartment and trunk, and remove all property therefrom. He shall be held responsible for seeing that all such property is recorded and properly safeguarded."

Certainly there could be nothing more reasonable than, at the earliest possible moment after appellant's car was delivered to the precinct parking lot, to secure that car against the immediate hazard of injury from the rain that was starting to fall and the future threat of depredation of its contents while it remained on the lot, easily accessible to any member of the public who wanted to loot it. These were the very objects Officer Baker had in view, as the trial court found (Tr. 241-242, 249, 254-255, 257-258, 260), when he left the station house and went out to the car. Parenthetically, this is the very same precinct lot, Number 6, which was involved in *Price* v. *United States, supra,* wherein an unauthorized person was found in Price's car as it stood on the police lot, "reaching under the front seat of the car," 348 F.2d at 69—and where, after the intruder's arrest, another piece of evidence was found under that seat.

Although the division states that "[t]he police cannot legalize unconstitutional searches simply by promulgating and acting pursuant to regulations, no matter how 'reasonable' they may be . . . . [and that] [c]ertainly evidence so obtained cannot be used against the accused" (slip op. at 3), it was recognized in *Ross* v. *United States*, —— U.S. App. D.C. ——, 349 F.2d 210, 213 (1965), that police practices which are based upon a balanced accommodation of fairness to the accused and police efficiency might very well survive constitutional challenge. Certainly the instant regulation meets that balancing test as did the procedures reviewed in *Stroud* v. *United States*, 251 U.S. 15 (1919). In that capital case letters written by Stroud after the homicide, while he was in prison, were turned over to the warden under prison practice who in turn furnished them to the prosecutor. In sustaining their introduction at trial the Supreme Court observed:

> "In this instance the letters were voluntarily written, no threat or coercion was used to obtain them, nor were they seized without process. They came into the possession of the officials of the penitentiary under established practice, reasonably designed to promote the discipline of the institution. Under such circumstances there was neither testimony required of the accused, nor unreasonable search and seizure in violation of his constitutional rights." (251 U.S. at 21-22.)

Use of the evidence obtained herein through the normal operation of a general regulation aimed at safeguarding property in police custody—a regulation not designed to secure evidence for criminal prosecution—is also sustained by the holding of the Supreme Court in *Frank* v. *Maryland*, 359 U.S. 360 (1959). See also *Johnson* v. *United States*, 110 U.S. App. D.C. 351, 293 F.2d 539 (1961), *cert. denied*, 375 U.S. 888 (1963); *Campbell* v. *United States*, 174 A.2d 87 (Mun. App. D.C. 1961) (Pistol found on floor of unattended car after officer opened car door to retrieve a key left in the ignition in violation of District law, held validly seized).

*Preston*, deemed dispositive by the division, dealt only with (a) searches incident to arrests and (b) exceptional searches of automobiles based on exigent circumstances. In the circumstances of that case the Court held the searches unreasonable under either theory. The car therein could not possibly have been seized as an instrumentality of the crime of vagrancy (the basis for the arrests) and, accordingly, the Court had no occasion to deal with that kind of a seizure. When the Newport, Kentucky police searched the car at the garage it was strictly an exploratory adventure into what was held on the facts to be a constitutionally protected area. Just because the officers may have previously gotten hold of the car put them in no better stead than the agents in *Kremen, supra*. On those facts it is unwarranted to assume that the instrumentality theory was rejected by the Supreme Court *sub silentio*.[9]

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[9] Nor does the division's speculation in footnote 5 give greater scope to the *Preston* holding. While "[a]lternative contentions [may be] the familiar stuff of the law" (*Scott* v. *Macy*, —— U.S. App. D.C. ——, 349 F.2d 182, 186 (Opinion of McGowan, J.)), the Solicitor General would be ill-advised to urge merely "arguable" or colorable theories to the Supreme Court.

There is an equally important reason why an instrumentality theory argument in *Preston* would have been unwise, *i.e.*, it was never urged before the two lower courts. *Cf. United States* v. *Sykes, et al.*, 305 F.2d 172, 174 (6th Cir. 1962). The Supreme Court has previously rejected such late arrivals in no uncertain terms:

> "In the two lower courts the Government defended the legality of petitioner's arrest by relying entirely on the validity of the warrant. In this Court, however, its principal contention has been that the arrest was justified *apart* from the warrant.
>
> . . .
>
> We do not think that these belated contentions are open to the Government in this Court and accordingly we have no occasion to consider their soundness. To permit the Government to inject its new theory into the case at this stage would unfairly deprive petitioner of an adequate opportunity to respond." *Giordenello* v. *United States*, 357 U.S. 480, 487-488 (1958) (footnote omitted).

Significantly, the Court did add in reversing the conviction, "[t]his is not to say, however, that in the event of a new trial the Government may not seek to justify petitioner's arrest without relying on the warrant." 357 U.S. at 488.

When *Preston* is thus matched against the facts of the instant case it simply fails, in our view, as controlling authority. Its application as such to warrant reversal of appellant's conviction is therefore an erroneous extension of the *Preston* rationale to truly "reasonable" police conduct. "It is a peculiar virtue of our system of law," observed Justice Brandeis, "that the process of inclusion and exclusion, so often employed in developing a rule, is not allowed to end with its enunciation and that an expression in an opinion yields later to the impact of facts unforeseen." (*Jaybird Mining Co.* v. *Weir*, 271 U.S. 609, 619 (1926)).

In sum, we fail to see where the "constable has blundered" herein.

## CONCLUSION

Wherefore, the appellee respectfully requests this Court to rehear this case *en banc*.

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## CERTIFICATE OF GOOD FAITH

I hereby certify that this petition is presented in good faith and not for delay.

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